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Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~652~~ 28

TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1965
CERTIORARI GRANTED FEBRUARY 21, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 652

TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the District of Colorado		
Complaint	1	1
Exhibit 1—National Railroad Adjustment Board, Third Division, Award No. 9988, Docket No. TE-6800, dated July 14, 1961 —	5	5
Dissent to award	51	51
Answer to Dissent	65	65
Order	71	71
Motion to dismiss	72	72
Request for admissions	73	73
Attachment—Letter from S. H. Schulty, Exec- utive Secretary, National Railroad Adjust- ment Board, Third Division, addressed jointly to George M. Harrison, Grand Presi- dent, and Stanley B. Eoff, General Chair- man, Brotherhood of Railway and Steamship Clerks, dated November 10, 1960	74	75
Attachment—Reply of George M. Harrison to S. H. Schulty, dated November 16, 1960	75	76

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**Record from the United States District Court for
the District of Colorado—Continued**

Plaintiff's response to request for admissions _____	76	77
Memorandum opinion and order, Chilson, J. _____	76	78
Amendment to memorandum opinion and order _____	83	86
Final judgment of dismissal _____	84	87
Notice of appeal _____	85	88
Statement of points to be relied upon on appeal _____	86	89
Clerk's certificate (omitted in printing) _____	86	89
Proceeding in the United States Court of Appeals for the Tenth Circuit _____	87	90
Opinion, Seth, J. _____	87	90
Judgment _____	98	97
Clerk's certificate (omitted in printing) _____	99	97
Order allowing certiorari _____	100	98

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Pleas and proceedings before The Honorable Alfred A. Arraj, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Hatfield Chilson, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

THE ORDER OF RAILROAD TELEGRAPHERS,
3860 Lindell Boulevard, St. Louis 8, Missouri, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Omaha, Nebraska, Defendant.

No. 8107, Civil

COMPLAINT—Filed July 12, 1963

Comes now The Order of Railroad Telegraphers, and for complaint against the defendant says:

1. This is a suit of a civil nature, to enforce an award and order of the National Railroad Adjustment Board, Third Division. This Court has jurisdiction of this action pursuant to Section 3, First (p) of the Railway Labor Act, as amended (Act of June 21, 1934, c. 691, Section 3, 48 Stat. 1189; U.S.C. Tit. 45, § 153, First, (p).)

2. The plaintiff is an unincorporated association with headquarters at 3860 Lindell Boulevard, St. Louis 8, Missouri. It is a standard railway labor organization of employees organized in accordance with the Railway Labor Act as amended. Its purpose and function are to serve as [fol. 2] the representative duly designated and authorized under the Railway Labor Act of employees in the craft or

class commonly known as telegraphers, on carriers subject to the Railway Labor Act, throughout the United States.

3. The defendant is a corporation incorporated under the laws of the State of Utah, is a carrier by railroad extensively engaged in interstate railroad transportation, as such carrier is subject to the Interstate Commerce Act, and is a "carrier" as defined in Title I of the Railway Labor Act as amended (U.S.C. Tit. 45, §§ 151 et seq.) The defendant's principal operating office is located in Omaha, Nebraska. It operates through the district of the United States District Court for the District of Colorado.

4. The plaintiff is, and for many years has been, the duly authorized and designated collective bargaining representative of the defendant's employees comprising the craft or class commonly known as Telegraphers. The plaintiff entered into an agreement with the defendant many years ago, covering work in the Telegrapher craft. That agreement has been revised from time to time and, so far as is here relevant, bears an effective date of January 1, 1952. The provisions of said agreement pertinent to the matter here in controversy are set forth on pages 3, 10, 11 and 12 of Exhibit 1 attached to this complaint and made a part hereof.

5. Prior to August 25, 1952, pursuant to the provisions of the agreement above described, only employees of the defendant represented by the plaintiff and subject to said agreement were assigned by the defendant to work in connection with transmitting and receiving communications of record such as consist reports of freight trains, manifest passing reports, manifest set-out and pick-up reports, and other related work; more particularly, such assignments of such work exclusively to such employees prevailed at defendant's Las Vegas (Nevada) Yard. All such work in defendant's Las Vegas Yard was, prior to August 25, 1952, performed by employees represented by the plaintiff and

subject to its aforesaid agreement at an office in said yard known as the Depot Telegraph Office or "VG" telegraph office. At said telegraph office such employees of various classifications qualified to perform such work were on duty in three shifts covering all twenty-four hours of each day.

On August 25, 1952 the defendant opened, in its Las Vegas Yard, at a point approximately one and one-quarter [fol. 3] miles distant from "VG" telegraph office, another office known as the West End Yard Office. In its West End Yard Office the defendant installed various IBM machines, specifically enumerated on pages 44 and 45 of Exhibit 1 attached hereto and made a part hereof. Some of such machines were for the purpose of performing and performed the functions in connection with transmitting and receiving communications of record theretofore performed exclusively by employees of the defendant represented by the plaintiff and subject to its aforesaid agreement. After the installation of such machines all work in connection with the operation of said machines, including the performance of the work theretofore performed exclusively by defendant's employees represented by the plaintiff and subject to its aforesaid agreement was assigned to employees of the defendant not so represented and not subject to said agreement.

7. Thereupon the plaintiff, through its General Committee on the defendant's railroad made claims upon the defendant claiming that such assignments were in violation of defendant's agreement with the plaintiff, seeking correction of such violations and claiming appropriate monetary compensation for employees subject to its agreement with the defendant to recompense them for loss of earnings suffered by reason of such violations, all as more fully set forth in Exhibit 1 attached hereto and made a part hereof.

8. The plaintiff handled said claims in the usual manner with the designated officials of the defendant up to and

including the highest operating officer of the defendant designated to handle such disputes. Having exhausted all possibilities of settling such disputes by negotiation with the defendant and having failed to reach an adjustment in this manner, the plaintiff thereupon submitted said claims to the National Railroad Adjustment Board, Third Division, as more fully set forth in Exhibit 1 attached hereto and made a part hereof.

9. After considering the evidence and the contentions of the parties, the National Railroad Adjustment Board, Third Division, issued Award No. 9988 on July 14, 1961 sustaining the plaintiff's claims to the extent set forth in the Award, Findings and Opinion of the Board, and on the same day issued an Order directing the defendant to make the Award effective on or before January 1, 1962. Exhibit 1 attached hereto and made a part hereof consists of certified copies of said Award and Order.

[fol. 4] 10. All facts stated in "Statement of Claim," "Employes' Statement of Facts," "Position of Employes," "Opinion of Board," "Findings," and "Award" in Exhibit 1 attached hereto are incorporated herein as statements of fact herein set forth.

11. Notwithstanding the Award and Order set forth in Exhibit 1 attached hereto the defendant has refused and continues to refuse to comply with said Award and Order.

Wherefore, the plaintiff prays that pursuant to Section 3, First, (p) of the Railway Labor Act (U.S.C. Tit. 45, § 153, First, (p)) the Court make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce the Award and Order referred to in Exhibit 1 hereof, and requiring the defendant to make an accounting to the plaintiff of all monies due under the aforesaid Award and Order to employees represented by the plaintiff, and for such other further relief as may appear to be just and equitable.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys
for the Plaintiff.

[fol. 5]

EXHIBIT 1 TO COMPLAINT

Award No. 9988
Docket No. TE-6800NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

THOMAS C. BEGLEY, REFEREE

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY
(South-Central District)

STATEMENT OF CLAIM: Claim of The Order of Railroad Telegraphers on the Union Pacific Railroad, South-Central and Northwestern Districts, that:

(a) The Carrier has violated and continues to violate the agreement between the parties signatory thereto, when it requires or permits employes not covered by said agreement to "handle" train orders at West End Yard Office, Las Vegas, Nevada, and

(b) that the Carrier has violated and continues to violate the agreement when it requires or permits other than those covered by said agreement to operate printing and/or mechanical telegraph machines used in the transmission or reception of messages and reports of record, and/or to perforate tape or cards as a function in the transmission or reception of messages and reports of record at the West End Yard Office, Las Vegas, Nevada, and

(c) that for such violations the Carrier shall compensate the senior idle employe or employes covered by the Telegraphers' Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing effective date of January 1, 1952, by and between the parties and referred to herein as the Telegraphers' Agreement, is in evidence.

In connection with the handling of train orders by employes not subject to the effective agreement at the Las Vegas Yard, Carrier's assistant superintendent issued the following bulletin:

Secretary's Certificate to foregoing paper (omitted in printing).

"UNION PACIFIC RAILROAD COMPANY
Office of Assistant Superintendent
Las Vegas, Nevada

[fol. 6]

August 21, 1952

ASST. SUPERINTENDENT'S CIRCULAR NOTICE NO. 122:

ALL TRAIN AND ENGINE MEN —
CALIF. FIRST SUBDIVISION
UTAH THIRD SUBDIVISION

Effective 7 A.M. (PST) Monday, August 25th, Las Vegas Yard will move from its present location to the new yard office located at West end of yard near Charleston Boulevard. Effective at that time, all waybills and train reports will be handled at the new Yard Office.

Conductors and trainmen arriving Las Vegas Westbound and leaving Las Vegas Eastbound will report for duty and finish tour of duty at Depot Telegraph Office, as has been the practice in the past. Waybills and train reports will be left or received at Depot Telegraph Office. Conductors should register in immediately, leaving all waybills and train reports at register for prompt dispatch to new yard office.

Conductors and trainmen leaving Las Vegas, Westbound and arriving Eastbound will report for duty and finish tour of duty at new yard office. Necessary clearances and train orders will be tubed to conductors there, and conductors will register in and out, using train registering ticket which will be tubed to Depot Telegraph Office. Regular register form will be provided for registering watch comparison.

Pneumatic tube has been provided for movement of waybills and reports between new yard office and Depot Telegraph Office. Where conductors leave waybills or reports at depot telegraph office, such waybills and reports should always be either enclosed in an envelope or carefully secured with rubber bands or string to insure handling without loss.

/S/ A. Bybee,
Ass't. Superintendent.

POST: Milford Las Vegas Kelso Yermo
CC: VWS WBG HSJ RDS KPV RAF JBC JEW"

The penultimate paragraph of the above quoted bulletin contains the instructions that pertain to the handling of train orders, clearance cards, etc., by clerical employees at the new yard office in lieu of bona fide telegraph service employees.

Concurrently with the opening of the new West End Yard Office at Las Vegas, Nevada, August 25, 1952, in addition to the pneumatic tube facilities used in connection with the handling of train orders and clearance cards, the Carrier installed certain machines in this new office which had for their purpose the performance of communications work, such as transmitting and receiving the following types of communications of record heretofore handled exclusively by telegraph service employees: (1) Consist reports of freight trains; (2) Manifest passing reports; (3) Manifest set-out and pick-up reports, and other related work.

[fol. 7]

Instead of transferring telegraph service employees from "VG" telegraph office, located in another part of the yard, to the new West End Yard Office, or creating telegraph positions at this location, the Carrier acting alone, and without proper advance negotiations, created and assigned the work of operating the communications machines (teletypes, perforators and IBM equipment), as well as the "handling" of train orders and clearance orders for delivery to trains at the West End, to clerical employees, who are not employees covered by the Telegraphers' Agreement.

The new Las Vegas, West End Office, is located approximately one and one-fourth miles from "VG" telegraph office. Train Orders and clearance orders for westbound trains are transmitted by this pneumatic tube facility from "VG" telegraph office to the West End Yard Office by telegraphers who have copied these communications from the train dispatchers. When the tubes reach the West End Yard Office containing the train orders and clearance communications, clerical employees, who are not covered by the Telegraphers' Agreement, remove the contents from the tube and handle them for delivery to the employees on the trains addressed.

The Organization claimed a violation of the agreement and asked that the work of operating the communications machines and the handling of the train orders and clearances be properly assigned to telegraph service employees at the New West End Yard Office at Las Vegas with penalty payments accruing until such time that this work is properly assigned to such employees. The Carrier denied the claim.

POSITION OF EMPLOYES: It is the position of the employees that the Carrier violates the agreement when it assigns to employees not subject to said agreement the function of handling messages, orders, and reports of record, including the delivery of orders and clearance cards to train crews leaving the new West End Yard; which work was formerly performed by employees in the classes specified in the agreement.

As indicated in the Employees' Statement of Facts, there is a telegraph office listing telegraph service positions at Las Vegas incorporated in Article 2, Rule 5 at page 16 of the Agreement between the parties and the communications work belonging to these telegraphers at Las Vegas has also been negotiated as work belonging to these positions. That part of the rule applicable to Las Vegas reads:

"Rule 5. General Telegraph Offices

Seniority District	Location and Position	Rate of Pay Per Hour
* * *		
4	Las Vegas "VG"	
	Manager	\$2.127
	2nd chief	
	Operator	
	Printer Mechn.	1.995
	3rd Chief	
	Operator	
	Printer Mechn.	1.995
	Telegrapher	1.851
* * *		

[fol. 8]

There are telegraphers on duty around the clock at Las Vegas "VG" telegraph office which is located in Las Vegas freight yard approximately one and one-fourth miles distant from the new West End Yard Office.

On August 25, 1952, the Carrier opened a new Yard Office in Las Vegas Yard, known as West End Yard Office. In doing so it installed certain communications machines for employees assigned in that office to operate. It also inaugurated a pneumatic tube facility for communicating between the new West End Yard Office and "VG". As explained, "VG" telegraph office and the West End Yard office are located approximately one and one-fourth miles apart. Instead of moving the telegraphers from "VG" office to the new West End Yard office, or creating new telegraph service positions at West End Yard, the Carrier acting alone, without proper advance conference or agreement with the Organization, created new positions not covered by the Telegraphers' Agreement, and ordered the occupants of such positions to handle train orders and to operate the communications machines (teletype, perforators and IBM) in the performance of work that had heretofore been performed by telegraphers. The Carrier also required that the telegraphers at "VG" telegraph office transmit by pneumatic tube, all train orders and clearance orders concerning the movement of trains from that office to the new West End Yard office where the clerical employees who are not covered by the Telegraphers' Agreement, are required to take such train order communications from the tube and handle them for delivery to the employees on the trains addressed before such trains can depart from West End Yard at Las Vegas. In addition to this the Carrier also requires these employees who are outside the Telegraphers' Agreement to handle train register slips and communicate the time of arrival of trains. All of these communications and the work involved in their handling, was previously performed by telegraph service employees at Las Vegas prior to the installation of communications machines (known as teletype, perforators and IBM) in the new West End Yard Office when it was opened August 25, 1952.

The Organization avers that subsequent to August 25, 1952, employees not covered by the Telegraphers' Agreement, who are employed in the new West End Yard Office at Las Vegas, have been required or permitted by the Carrier to operate the communications machines, as well as "handle" train orders, clearance orders and messages; work that was previously handled and performed by and still belongs to telegraph service employees under the terms of the Telegraphers' Agreement, at Las Vegas. Here we have the Carrier, acting alone, removing work from under the scope of the Telegraphers' Agreement and transferring and assigning such work to outside employees.

The handling of this claim on the property is reflected in the following which are attached as Employees' Exhibits. We respectfully request that each of these exhibits be made a part of this claim:

August 21, 1952, Circular Notice No. 122 from Assistant Superintendent A. Bybee to All Train and Engine Men. (Employees' Exhibit No. 1). This has already been quoted in the Employees' Statement of Facts.

September 10, 1952, letter from General Chairman A. S. Herrera to Supervisor of Wage Schedules, A. L. Dixon. (Employees' Exhibit No. 2). This letter protested the violations resulting from Carrier's notice No. 122 and established the claim of the Organization.

September 23, 1952, letter from Supervisor of Wage Schedules to General Chairman. (Employees' Exhibit No. 3). In this letter Carrier admits the violations, but denies claim.

[fol. 9]

October 20, 1952, letter from General Chairman appealing claim to Assistant to Vice President F. C. Wood. (Employees' Exhibit No. 4).

October 23, 1952, letter of acknowledgment from Assistant to Vice President to General Chairman. (Employees' Exhibit No. 5).

November 17, 1952, letter from Assistant to Vice President to General Chairman concerning official denial of the top ranking official of Carrier to whom appeals are made. (Employees' Exhibit No. 6).

December 5, 1952, letter from General Chairman to Assistant to Vice President in which the Organization placed the Carrier on notice that the claim would be appealed under the provisions of the Railway Labor Act, amended, and that all of the features of the violations complained about at Las Vegas would be incorporated into one claim in the same manner as handled on the property. (Employees' Exhibit No. 7).

In Employees' Exhibits Nos. 2 and 4, which have been made a part of this claim, we showed certain work performed on several days to prove that there were a considerable number of train orders and clearance orders handled daily by clerical employees not covered by the Telegraphers' Agreement at the new West End Yard Office at Las Vegas. While the Organization has copies of all of these train orders and clearances handled on each day listed in these exhibits, rather than burden the record with all of the evidence, we attach hereto and make a part hereof Employees' Exhibit No. 8, which contains reproduced copies of clearance orders handled by the clerical employees not covered by the Telegraphers' Agreement at the new West End Yard Office on an average day, August 27, 1952, which is typical of other similar days. There it will be seen that over a 24-hour period these employees outside the provisions of the Telegraphers' Agreement handled 9 clearance orders.

Employees' Exhibit No. 8(A) contains three train orders handled for delivery by clerks. One Form 31 and two Form 19 orders. All of these train orders and clearance orders were copied by a telegrapher at "VG" telegraph office from a train dispatcher and placed in the pneumatic tube and transmitted to the new West End Yard Office where employees not covered by the Telegraphers' Agreement proceeded to complete the handling of the orders by making delivery to the trains addressed.

It will be noted in Employees' Exhibit No. 8(A) that Form 31 train order No. 302 was signed by Conductor O. H. Harris of Extra 1876 West, at Las Vegas. In order to handle this type of train order, which is highly important and exacting in the movement of trains (that is why it requires the signature of the Conductor), under the new system inaugurated by the Carrier in the handling of train orders by pneumatic tube, the telegraph service employees at "VG" telegraph office, since August 25, 1952, are required to place any unsigned Form 31 train orders in the "tube" and send it to the West End Yard office where a clerical employee, not covered by the Telegraphers' Agreement, removes the train order from the "tube", takes it to the conductor of the train to which addressed, obtains the signature of the train conductor and returns the train order through the "tube" to "VG" telegraph office. The telegrapher at "VG" telegraph office then repeats the signature of the conductor to the train dispatcher over the wire and then receives "complete" to the order which he writes in the bottom line as shown on Form 31 Train Order No. 302, in Employees' Exhibit No. 8(A). After

[fol. 10]

the train order is "completed" the necessary number of train orders together with the necessary number of clearance orders are placed in the "tube" by the telegrapher in "VG" office and sent back to the West End Yard office, where the employe outside the coverage of the Telegraphers' Agreement is again required to handle it for final delivery to the necessary members of the train crew to which addressed. It will be noted that all train orders and clearance orders are addressed to conductor and engineer, another copy is given to the rear brakeman, which means that at least three copies of all of these orders must be given to each train crew. Such requirements are clearly outlined in Carrier's Operating Book of Rules. Rule 210 of this book states:

"Unless otherwise directed, when a train order has been transmitted, operators must repeat it in the succession in which the several offices have been addressed. Each operator receiving order must observe whether the others repeat correctly and inform train dispatcher if incorrectly repeated.

'31' train orders must show time repeated; all train orders must show time made complete and operator's last name.

'31' orders must be signed by conductor or engineer and others addressed, and signatures transmitted to train dispatcher. When a '31' order has been signed by conductor and made complete, operator will supply conductor with copies for himself, engineers and rear brakeman. When a '31' order has been signed by engineer and made complete, operator will deliver copies to each engineer, and to conductor and rear brakeman.

When a '19' order has been made complete, operator will deliver it to those addressed and rear brakeman, except when delivery will take operator from vicinity of office, conductor or brakeman may make delivery." (Emphasis added.)

Here it will be seen that under the Carrier's own operating rules governing the movement of trains on its railroad, it specifically requires that:

"Operator will deliver copies to each engineer and to conductor and rear brakeman."

This operating rule of the Carrier is further confirmed by the parties under Article 8, Rule 62 of the currently effective Telegraphers' Agreement which reads:

"No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

There have been many awards of your Board dealing with the question of "handling train orders" similar to that which we here have at Las Vegas. For ready reference there is quoted next below excerpts from awards which cover specifically the identical issue here involved in the handling of train orders at Las Vegas:

[fol. 11]

Award No. 709:

"It would appear that under a fair and reasonable interpretation of this rule (meaning Article XIII), the handling of a train order should include not only the physical process of passing it from hand to hand in the performance of its function but also the work involved in its preparation."

Award No. 1169:

"* * * the Carrier sought to make delivery of train orders at a station where a telegrapher was employed, through means other than a telegrapher.

* * * * *

We have consistently held that such attempted circumvention of the rule was abortive. The Carrier emphasizes its right to conduct the working details of its railroad, and urges that if it may not proceed in the manner here it is being subjected to control by forces acting without authority. We do not view that problem in that light. The Carrier fixed the status of the station in question, denominating it a telegraphic one, and at all times important here assigned one telegrapher to the station. In such circumstances, what does the rule require? We have stated it often. Briefly, our holding has been that at all telegraphic stations, train orders shall go through telegraphers, 'in usual course if on duty, and pursuant to "call" if off duty,' directly to train crews. The purpose of the agreement was to assure telegraphers employed by carriers the full fruits of their employment. Award No. 86. The gist of our present holding is, and the spirit of all our holdings on the question involved has been, to give recognition to the reasonable meaning of the agreement, into which the carrier, no less than the employees, competently entered."

Award No. 1220:

"Under the scope and other rules of the Telegraphers' Agreement it is definitely established that work in connection with the receipt and delivery of train orders belongs to employees coming within the jurisdiction of the Telegraphers' Agreement * * *." (Emphasis added.) See also Awards 1221, 1222, 1223, 1224 and 1225 for like expressions.

Award No. 1304:

"In behalf of the claim it is urged that under Article XIII, of the Agreement, only telegraphers and train dispatchers may handle train orders at telegraph stations, hence, as said, orders from the dispatcher governing train No. 12 from Fort Madison, which, as we have seen, is such a station, should go to a telegrapher there, serving under call, if necessary, and delivered by that employee to the conductor who takes over the train at that point.

Any handling other than that advanced by the employees, including that adopted by the carrier here, as we are constrained to believe, breaches the Agreement. Hence, and not pausing for ex-

[fol. 12]

tended statement and analysis of the Agreement, fully developed by the record, or of the many awards cited and digested by the parties in their written contentions, we conclude the claim should be sustained."

Award No. 1713:

"The provisions in Article 13 that no employe other than covered by the schedule will be permitted to 'handle' train orders means that the employe has the right to receive, copy, and deliver orders. Many awards of this Division have so construed this rule, which interpretation is in harmony with the scope rule, is sound, and should be and is adhered to by the Board. In Award 86 the Opinion states with reference to the rule:

"The Rule is quite clear and requires no unusual interpretation. Doubtlessly it was made for the purpose of preventing encroachments upon that work to which the employes in that particular craft were entitled. * * *"

Award No. 5013:

"This division of the Board, after extended and spirited debate on the subject, is now definitely committed to the view that a Train Order Rule containing language of the kind to be found in the one now under consideration is clear and unambiguous and that its terms, particularly the phrase 'to handle train orders', are to be construed as contemplating the receiving, the copying, and the delivering of train orders to the train crews which are to execute them. See Awards 86, 709, 1166, 1422, 1680, 1713, 1878, 1879, 2087, 2926, 2928, 3611, 3612, 3670 and 4057. Also see Award 4770, where although the claim was denied on the ground it was based on the Scope Rule only, the foregoing interpretation was again approved and it was definitely indicated that had the Agreement contained a Train Order Rule similar to the instant one a sustaining award would have been required." (Emphasis added.)

Award No. 5087,

"This Division has repeatedly held that the handling of train orders within the contemplation of the ordinary train order rule such as we have here, means that the receiving, copying and delivering of train orders is reserved to telegraphers. Awards 2926, 4770."

Award No. 5122:

"It has long been the rule that the work of a class of employes reserved to them in a collective agreement cannot be delegated to others without violating the agreement. The Telegraphers' Agreement reserves the sending, receiving, copying and delivering of train orders to the telegraphers. It is also well established that the receiving of such communications includes copying and delivering to the train crews which are to execute them. Award 1713. The handling of train orders at a station where there is an employe covered by the Telegraphers' Agreement is work belonging to that employe. His right to the work cannot be circumvented by devices

[fol. 13]

such as depositing the train orders in waybill boxes or attaching them to train registers. Award 1878. Nor may they be entrusted for delivery to someone not included within the class covered by the Agreement. Award 2087. Consequently, they may not be handed to one train crew for delivery to another. Award 2936."

Award No. 5810:

"The dispute involves the meaning of the term 'to handle train orders' as used in Rule 26. The Carrier asserts that this expression means that telegraphers shall copy such orders and perform such duties with reference to them that require the skill or training of a telegrapher. It contends that the rule was never intended to prohibit the 'messengering' of train orders. The Organization contends that the handling of train orders includes their delivery to the addressee. This is a question that has been before this Board many times and it has repeatedly been held that the handling of train orders includes their delivery to the addressee. Awards 1713, 1719, 5013, 5087, 5122."

See also Awards 1719, 1422, 1680, 1878, 1879, 2087, 2926, 2928, 3611, 3612, 3670, 4057.

It has thus here been definitely established that, based on Article 8, Rule 62 and the above listed sustaining awards of your Board, as well as Carrier's own operating rules, the Carrier is acting in breach of the agreement in requiring or permitting employees not covered by the Telegraphers' Agreement at West End Yard, Las Vegas to handle train orders and clearance orders in lieu of bona fide telegraph service employees.

As for the violations concerning the transfer of work covering communication reports of record, from telegraph service employees at Las Vegas to clerical employees outside the Telegraphers' Agreement to perform on such machines as I.B.M., Teletype and reperforators, et al, the Organization attaches hereto Employees' Exhibit No. 9, which we ask be made a part of this claim.

This Employees' Exhibit No. 9 is a copy of IBM Form 819791 which is a car record card with perforations to indicate all the particulars as to the contents and destination, etc., of a certain car. Similar cards are used for each and every freight car moving in and out of Las Vegas Yard. When these cards are completed by clerical employees who are being required to operate the IBM machine which perforates these cards, the cards are assorted and placed in order of the position of the freight cars in the train. The cards so assorted are then placed in a machine that perforates tape by electrical impulses from the holes in the cards as these cards pass through the machine. This consist report work was formerly transmitted exclusively by telegraphers at Las Vegas.

Employees' Exhibit No. 10 which is also attached hereto and made a part of this claim is a sample of what the tape looks like and what it states. This sample copy is typical of the information that the tape contains.

After this tape is made from the IBM car record card it is then placed in a teletype machine which automatically prints and transmits the information contained on this tape that was taken from the car record cards which were perforated by the clerical employee. The Organization attaches hereto

[fol. 14]

Employees' Exhibit No. 11 which is a typed consist report of a train and the final result of the information contained on the IBM car report card.

This train consist communication work was work formerly performed by telegraph service employees by telegraph, telephone and teletype — but now the Carrier with the installation of the new IBM facilities covering communications service, has turned the initial work, which is the perforating of the IBM car report card from the information on the waybills, over to clerical employees and, acting alone, has deliberately denied telegraphers the right to perform the communications functions involving this new device. The Organization submits that it has contracted for this work under the provisions of the Scope Rule and other rules of the effective contract and that the Carrier has arbitrarily taken such work away from telegraph service employees and has given the communications work to employees not covered by the Telegraphers' Agreement in breach of the contract extant between the parties.

The following rules of the Telegraphers' Agreement are invoked in this dispute:

"ARTICLE 1 — SCOPE

Rule 1. This agreement will govern the wages and working conditions of agents, agent-telegraphers, agent-telephoners, telegraphers, telephoners, telegrapher-clerks, telephoner-clerks, telegrapher-car distributors, ticket clerk-telegraphers, telegrapher-switch-tenders, C.T.C. telegraphers, train and tower directors, towermen, levermen, block operators, staffmen, managers, wire chiefs, repeater chiefs, chief operators, printer mechanicians, telephone operators (except switchboard operators), teletype operators, printer operators, agents non-telegraphers, and agents non-telephoners herein listed.

"ARTICLE 2 — POSITIONS AND RATES OF PAY

Rule 5. General Telegraph Offices. (a) Positions and rates of pay in general telegraph offices under the jurisdiction of the Superintendent Telegraph shall be as follows:

* * *

4 Las Vegas 'VG'

Manager	2.127
2nd chief operator-printer machn.	1.995
3rd chief operator-printer mechn.	1.995
Telegrapher	1.851

* * *

(b) All hourly rated managers in telegraph offices listed in this rule, except Nampa, Seattle, Las Vegas, and Los Angeles 'ZO' will be assigned 8 a.m. to 5 p.m., with the meal period of one hour.

Rule 6. New Positions. The wages of new positions shall be in conformity with the wages of positions of similar kind or class in the seniority district where created."

[fol. 15]

"ARTICLE 3 — TIME ALLOWANCES

Rule 10. Daily Guarantee. Regularly assigned employees will receive eight hours pay for each twenty-four hours, at rate of position occupied, if ready for service, or if required to be on duty less than eight hours, except on rest days and holidays."

"ARTICLE 4 — HOURS OF SERVICE AND OVERTIME

Rule 20. Basic Day. Except as provided in Rule 21, eight consecutive hours, exclusive of the meal period, shall constitute a day's work, except that where two or more shifts are worked eight consecutive hours with no allowance for meals, shall constitute a day's work."

"ARTICLE 6 — SENIORITY

Rule 31. Seniority Date. (a) Employees will be accorded a seniority date upon completion of ninety days continuous service, or ninety days continuous assignment assignment to the extra board; seniority to date from date such continuous service or assignment commenced in the seniority district in which it accrued.

* * *

Rule 34. Bulletined Positions. (a) Positions or vacancies (except as provided in Rule 35), will be bulletined on bulletin boards accessible to all employees in the seniority district on bulletins dated and issued as of the first and sixteenth of each month. Bulletins will be numbered consecutively from the first of each year. Copy of bulletins will be furnished local chairmen.

* * *

Rule 38. Bulletined Positions — Assignments. (a) Successful applicants for positions shown on bulletins posted in accordance with Rule 37 will be promptly advised by wire of their assignment, with copy to the local chairman. Employees assigned to positions included on bulletin of the first of the month must take the position on or before the first day of the succeeding month, and employees assigned to positions included on bulletin of the sixteenth of the month on or before the sixteenth day of the succeeding month, unless leave of absence is granted with the approval of the superintendent and local chairman. Assignments to positions will be shown on next regular bulletin issued in accordance with Rule 34.

(b) Where it is not practicable for the company to place an employe on bulletined position to which assigned within the time limit prescribed in Section (a) of this rule, he will be paid the higher rate of the two positions and any additional personal expenses incurred for the period withheld from new assignment beyond the time limit prescribed in Section (a) of this rule. Rule 11 will not apply, neither will the employe have any claim for guarantee of new assignment.

* * *

[fol. 16]

Rule 47. Promotion. (a) Promotion shall be based on seniority and qualifications; qualifications being sufficient, seniority will prevail.

(b) Employees will be given full cooperation in their efforts to qualify for positions on which they have not had previous training and experience. General chairman will confer with general managers and superintendent telegraph on affording employees included within the scope of this agreement an opportunity to qualify for such positions.

Rule 52. Extra Boards. (a) Extra boards regulated by the superintendents will be maintained on each chief train dispatcher's district, except that only one extra board will be maintained in the Los Angeles chief train dispatcher's office to cover both the Los Angeles and Las Vegas chief train dispatchers' districts. Lists will be posted in chief train dispatchers' offices showing name and standing of employees assigned to extra boards. Extra employees may establish headquarters at any point on the chief train dispatcher's district.

* * *

(c) Extra employees will be permitted to qualify for positions of printer operator, teletype operator, towerman or leverman at their own convenience."

"ARTICLE 8 — GENERAL

Rule 62. Train Orders. No employee other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available, or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call.

Rule 70. Date Effective and Change. This agreement will be effective as of January 1, 1952, and shall continue in effect until it is changed as provided herein, or under the provisions of the Railway Labor Act.

Should either of the parties to this agreement desire to revise these rules, thirty days' written advance notice, containing the proposed changes shall be given, and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

In accordance with the provisions of the above listed effective rules of the contract extant between the parties to this dispute, the Organization avers:

1. That the Scope Rule (Article 1, Rule 1) gives to telegraph service employees the right to perform the work of handling all

[fol. 17]

communications service of record whether performed by telegraph, telephone, teletype, printer perforator, and any other communication device or machine. Under this Scope Rule any and all railroad communication work of record basically belongs to a telegraph service employe.

2. Article 2, Rule 5, clearly indicates that telegraph service positions have been negotiated into the agreement and made a part thereof at Las Vegas, conclusively proving that the Carrier has recognized through collective bargaining that the work of handling communications service of record belongs to telegraphers at Las Vegas.
3. Article 3, Rule 10, is the daily guarantee rule which requires that regular assigned employes will receive a full day's pay of eight hours, five days a week, if ready for service. Telegraph service employes are ready for service and should be regularly assigned to perform the work involved in this claim at West End Yard Office, Las Vegas.
4. Article 4, Rule 20, is the Basic Day Rule, it provides that eight consecutive hours shall constitute a day's work. The Organization contends that based on the work that the Carrier has taken away from telegraph service employes commencing at the time that the new West End Yard office at Las Vegas opened, that telegraph service employes are being deprived of eight hours' work each day on each shift and that the senior idle employe or employes are entitled to payment for work denied.
5. Article 6, Rule 31(a), concerns the establishing of seniority under the Telegraphers' Agreement. Seniority is a valuable property right to telegraph service employes and the right to perform work contracted to such employes is highly important. When such employes are unilaterally deprived of work which should be assigned to these employes they have a justified claim against the Carrier.
6. Article 6, Rule 34(a), provides for the advertising of positions or vacancies to the employes in the classes covering the work historically and traditionally belonging to our craft.
7. Article 6, Rule 38, explains how bulletined positions are to be assigned, and if the employes are not placed on such positions it indicates how penalty payments must be made. The Organization holds that the proper number of telegrapher positions at the new Yard Office, West End Yard at Las Vegas, should have been bulletined to telegraph service employes and assigned to them in accordance with these rules. Since the Carrier did not comply with the requirements under the rules, then it is liable for the penalty payment claimed.
8. Article 6, Rule 47, provides that telegraph service employes will be promoted and will be trained and given an opportunity to become qualified on any position. The Carrier in this claim, denied the employes here involved the right to become qualified

[fol. 18]

and to perform the work to which their seniority and scope coverage assigned to them.

9. Article 6, Rule 52, provides that extra employes will be permitted to qualify for positions of printer operator, teletype operator positions and be used to fill such positions when vacancies occur. The Carrier has refused to permit extra telegraphers to qualify or to work at Las Vegas West End Yard office to perform the communications work handled by the printer or teletype machines.
10. Article 8, Rule 62, is the Train Order Rule which we spoke about earlier in this brief. It definitely provides that only telegraph service employes and train dispatchers, will "handle" train orders, and that includes the personal delivery of such train orders as ruled by your Board in the numerous awards previously cited and quoted in this case.
11. Article 8, Rule 70 is the concluding rule of the contract. It provides that the only manner in which this Agreement can be changed is under the provisions of the Railway Labor Act, which means that if the Carrier desired to make the changes it unilaterally put into effect at West End Yard, Las Vegas, it was required to serve proper notice on the Organization of the desired changes and conduct conferences and negotiations to properly dispose of the question. Since the Carrier has failed to comply with this rule it is acting in breach of the Railway Labor Act as well as the rules of this contract.

As the Scope Rule (Article 1, Rule 1) is the important rule which provides the basis for all the other rules of the Agreement and is the central and controlling statement of the intent of the parties to the agreement with respect to the work covered by the classes shown therein, the Organization here wishes to again stress its importance in this case. The Scope Rule is the rule about which the other rules revolve, and upon which they are founded and dependent. As its name signifies, it stipulates the SCOPE — COVERAGE of the Agreement, and contains the subject matter of the instrument as pronounced that the parties have agreed that the provisions of this agreement "will govern the wages and working conditions" of the employes in the classes specified in the scope rule; its very intent and purpose is to protect the employes in whose behalf it was made against encroachment by those not subject to its terms. It is meant to cover work of the classes specified therein and it is essential to the protection of employes, and the Organization of which such employes are a part. As your Board said in Award 1501, "A competent and fully qualified Organization cannot be maintained if parts of its work are to be chiselled off and given to other crafts." Your Board has heretofore passed judgment in Scope Rule disputes — scores of them — and has consistently held to the principle that work of a class covered by an agreement belongs exclusively to the employes in whose behalf it was made and cannot be delegated to others without violating that agreement.

Seniority and work under collective agreements such as here in evidence, have been recognized and held to constitute a valuable property right, the preservation of which every employe on the roster has a direct interest. See Awards 2616 and 5133. When work opportunities are withheld from

[fol. 19]

employees they are deprived of their rights specifically and definitely reserved to them by the Agreement. In Award No. 1169 your Board said:

"The purpose of the agreement was to assure to telegraphers employed by Carriers the full fruits of their employment. Award 86. The gist of our present holding is, and the spirit of all our holdings on the question involved has been, to give recognition to the reasonable meaning of the agreement, into which the carrier, no less than the employees competently entered."

The logic of this statement is applicable to the present case which involves deprivation of the exercise of seniority rights to the employees which the agreement intended that they should have. The value of seniority is represented in work opportunity accorded the employees in the order of their standing on the roster. Seniority would be meaningless without positions (work). Each position enhances the value of seniority while each position abolished or withheld devalues seniority. Every employee on the roster has an equity in the positions embraced within the fixed seniority district. The number of positions and the amount of work available determines the worth of seniority. Years of service mean nothing unless the opportunity to apply the value of that service is afforded on a seniority basis. Seniority is the thing that stabilizes employment in the railroad industry and the Carrier reaps the benefits of it as well as the employees.

That is why the courts of our land, and your Board as well, have given to seniority and work such great significance. That factor is present in this case and the impact of the Carrier's action must here be seriously considered in that light.

When the Railway Labor Act was first enacted by Congress on May 20, 1926, it provided in Section 2, First:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes * * *."

To upset or overturn the arrangements and agreement between the Carrier and the Telegraphers, and assigning any part of this work here involved to employees not covered by the Telegraphers' Agreement, would violate the mandatory provisions of a Federal Law under Section 2, First, of the Railway Labor Act. This duty to "exert every reasonable effort to make and maintain agreements * * *" is not a one-sided obligation. It applies to Carriers and employees alike. An agreement is not maintained if one of the signatories to the agreement acting unilaterally effects a revision causing the agreement to decline for lack of support once openly agreed upon. Your Board said in Award 2611:

"* * * it was as much the duty of the carrier to conform to the current agreement as it was that of the employee and his organization to protest a violation thereof, and it would be inequitable to permit the carrier to reap a benefit from its own wrong."

We feel that it is important to briefly review the history of the telegraph based on the historical tradition of railroad telegraphers on the railroads performing this service, particularly with respect to craft jurisdiction. The old semaphore method of transmitting intelligence with semaphores

[fol. 20]

placed within vision was termed telegraph, as is the modern electrical variations either by the use of wire or without wire. The heliograph as used in World War I by telegraph battalions was properly referred to as telegraph. It is not accurate, therefore, to say that telegraph refers only to Morse telegraph. The first communication service inaugurated by railroads was Morse telegraph, then came the telephone, the printing telegraph (various trade names, such as printer, printing machines and teletype) and radio; the radio's use is limited with respect to communications of record. By tradition the appellation "telegrapher" or "operator" has been given to any person who operates the telegraph, the telephone, the printing telegraph, or the radio.

Lexicographers define "a telegrapher" as "one who telegraphs." "Telegraph" is defined by Webster as:

"An apparatus for communication at a distance by means of preconcerted signals; in the broadest sense an apparatus or system for communication at a distance other than the ordinary ones of speech and letter writing."

The Encyclopedia Americana, 1945 edition, tells us —

"The word 'telegraph' is derived from the Greek 'tele' — 'afar off' and 'graph' 'to write.' In its broad sense it has been used to designate any means by which intelligence is transmitted to a distance by signs or sounds but in modern times its use has been to describe the electrical transmission of written or printed communications."

The automatic or printing telegraph is one of the more recent developments in the light of the fact that some form of telegraph has existed for several hundred years and that the electrical telegraph systems have been in use for more than one hundred years. The Encyclopedia Britannica, a 1947 edition, tells us "the classification of automatic telegraph may broadly include all systems in which signals are transmitted by machine methods and automatically recorded."

The use of automatic telegraph or mechanical message machine, in railroad work began about 1915 and the upward surge in improving, installing and using these machines dates from about 1927, and the use of automatic telegraph (printing telegraph machines) is rapidly increasing. Therefore, it is clear, notwithstanding any allegations to the contrary, that the functions of the printing telegraph machines and similar devices have supplanted the telegraph and the telephone for communication service. This being so, such machines and devices are squarely placed within the confines of the accepted definition of the word "telegraph."

The printing telegraph has a history, of course. It is said the first machine was invented in 1855, but except for historical purpose that is unimportant. The modern day printing telegraph made its appearance with the Western Union Telegraph Company around 1918 — with a trade name of Barclay. Since that time trade names have changed, e.g., the Western Electric Multiplex, the Morkrum, etc. But the five unit code developed as early as 1875 is exactly the code that is used in the present modern day printing telegraph machines. The morkrum is the predecessor of the present teletype or mechanical message machine and this machine is used quite extensively on many railroads.

[fol. 21]

There are various types, models and kinds; in principle, however, all are the same. Printing telegraph machines are used in several categories, however the most common are: (1) perforation (punching) of tape, which tape simultaneously passes through a transmitter and transmits a telegraphic communication, (2) the same as category (1) except by depressing the keys on a keyboard—similar to the keyboard on a typewriter—the electrical variations become active and a telegraphic communication is transmitted. Tape perforation is not involved here but the transmission of communications is the same principle as when tape is used. Category (2) type of printing machine is involved in the instant proceeding and is known by the trade name of "teletype." The receiving side of the instant operation is identical to the receiving side of all other types of printing telegraph machines. The ultimate result of the operation of any and all printing telegraph machines is the dispatching of messages, reports, etc., from one location to another by telegraph. There can be no mistake about that! The Organization holds, by virtue of history, practice and contract the operation of any machine which leads to and completes a communication of record, is telegraph operation and that such operation is covered by the Telegraphers' Agreement. A parallel situation exists where diesels are substituted for steam locomotives, electric tamping machines are substituted for hand tamping of cross-ties, etc.

Without fear of contradiction the Organization asserts, and it is generally agreed, that the use of printing telegraph machines is in lieu of Morse telegraph or telephone—as the telephone is frequently used in lieu of Morse telegraph. As far back as 1919 when only a few printing telegraph machines were in operation on the railroads, the question of jurisdiction arose. The United States Railroad Administration on April 30, 1919, by its Interpretation No. 4 to Supplement No. 13 to General Order No. 27 very definitely and properly disposed of the issue. We quote from that Interpretation:

"Question 5.—Do the following classes of employees come within the provisions of Supplement No. 13, and shall such positions be incorporated into existing agreements and into agreements which may be reached in the future on the several railroads?"

* * * * *

(e) Employees whose duties require transmitting and/or receiving messages, orders, and or reports of record by telephone between various railroad offices in the same city or district in lieu of telegraph?

Decision.—Yes, the use of the telephone to transmit or receive messages, orders, or reports of record in lieu of the telegraph carries to the position the provisions of Supplement No. 13."

* * * * *

(g) Operators of mechanical telegraph machines used for receiving and transmitting messages?

Decision.—Yes."

Decision No. 2374, of the United States Railroad Labor Board, dated April 14, 1924, hewed to the line established by the United States Rail-

[fol. 22]

road Administration. The Railroad in that proceeding had its day in court. The Dissenting Opinion of Board Member Baker, a Carrier representative, reads:

"The operation of automatic printers does not require in the slightest way knowledge of Morse, Continental, Phillips, or any other telegraphic code, yet the decision not only fixes that these devices, wherever used, must be manned by telegraphers, but by its language also fixes that if any of the present automatic-printer operatives are not telegraphers, they must, irrespective of length of service or capability be set out to make room for one of the newly created, preferential class."

The National Railroad Adjustment Board, Third Division, created by the Railway Labor Act of June 21, 1934, and successor to the United States Railroad Labor Board, in its Award No. 864, dated June 20, 1939, dealing with teletype (a mechanical telegraph message machine with a trade name) operation stayed well within the pattern. For ready reference the Organization's Statement of Claim in that case is quoted in full and in addition excerpts from the Opinion of Board:

CLAIM

"Claim of the General Committee of The Order of Railroad Telegraphers on the Denver and Rio Grande Western Railroad, that the hourly rate of pay established through negotiations and agreement for telegraphers in the several offices on the system likewise applies to employees who operate teletype machines in communication service in lieu of the telegraph in offices where teletypes are installed, and employees who operate teletype machines shall receive the negotiated telegraph rate in the office where such service is performed, and that: Since the installation of these teletype machines in certain offices employees receive and transmit by teletype mechanical devices instead of Morse mechanical devices, business of the office or offices in question and the same result is obtained by the use of either mechanical device, that all such employees in said office or offices who have received a lower rate of pay for the time occupied in teletype service than that negotiated and fixed by agreement for telegraph service, shall be reimbursed the difference between the negotiated telegraph schedule rate and the arbitrary rate fixed by unilateral action of the management for teletype service, retroactive to the date teletype service was inaugurated in the office or offices involved in this dispute."

OPINION

"* * * Carrier, however, taking the position that the work was not covered by the prevailing agreement, did not give the notice specified in Rule 35 applicable to proposed changes in the Agreement.

"* * * The Brotherhood contends the work is covered by the Agreement and the claim is for the difference in this rate of pay, so established by Carrier, and that fixed by the Agreement for telegraphers in such offices. It should be observed that no jurisdictional dispute is involved in this case.

* * *

[fol. 23]

"The Board is of the opinion that the work is covered by the agreement and that it has jurisdiction over the dispute. The agreement is clearly applicable to certain character of work and not merely to the method of performing it. To hold otherwise would operate to destroy collective bargaining agreements. Improved methods have no more effect upon such agreements than such agreements have upon the right of the Carrier to install such methods. Certainly no one would question the right of carriers to make improvements in methods of performing work and we think it is equally true that improved methods do not operate to take the work out from under contracts with employees performing same. The tele-type is simply a new and improved mechanical device used for the performance of the same work theretofore performed by the use of Morse instruments." (Emphasis added.)

Then comes a Board of Arbitration, another legally constituted tribunal, in Case A-1023, Arb-20, dated January 14, 1943, (ORT vs CRI&P) with the following statement:

"Printer operators and Morse operators are covered by the Telegraphers' Agreement of January 1, 1928, are engaged in the communications service of the carrier and transmit and receive messages and reports of record.

In performing telegraph work Printer operators use a mechanical device called a printer machine and Morse operators use an instrument known as the Morse Telegraph. * * *

* * * It will be observed that the printer machines are referred to as telegraph printing machines and the operators referred to as telegraph printing machine operators.

* * * It clearly appears from the record that many more messages can be and are sent within a given time by telegraph printing machines, than are or can be sent by the Morse telegraph instrument. A witness for the carrier testified that per eight-hour day in the Kansas City office, about 200 messages are sent and received by Morse operators and about 400 messages are sent and received by telegraph printer operators.

* * * The Carrier stresses the fact that a Morse operator must send and receive messages, while a message transmitted by a printer telegrapher is received automatically by the receiving instrument and it is not necessary for such operator to be present when the message is received. But this result is due to the fact that the telegraph printer machines is an improved device for handling telegraph work. The carrier installed the machines in 1929, because they would handle telegraph work more efficiently and economically than the Morse instruments. * * *

* * * The Carrier has not introduced evidence that tends to establish its contention that there is a 'vast difference' in the responsibilities of the respective operators. We perceive no substantial difference in their responsibilities. Each has the responsibility of skillfully and efficiently operating his instrument and of accurately transmitting and receiving messages and reports. Each is responsible for the work handled.

[fol. 24]

The printer operator uses the improved device, furnished by the Carrier, to more efficiently and economically handle telegraph work performed by Morse operators before it was installed. The Morse and Printer operators in the same office use different types of telegraph instruments to perform the same kind of work. * * *

The importance of the work performed by printer operators, their duties and responsibilities, compare most favorably with the duties, responsibilities and importance of the work handled by Morse Operators." * * * (Emphasis added.)

Herein above the Organization has asserted with evidence in the form of decisions of the most competent authority that it has jurisdiction over communication service of record, whether that service is Morse telegraph, telephone, radio, printing telegraph, mechanical message machines, (I.B.M. or teletype) or any other apparatus which has for its purpose the transmitting or receiving of intelligence from one location to another. There is absolutely no difference in result of the work performed by either method; all are covered by the agreement specifically. Of the several score awards of the Third Division, National Railroad Adjustment Board, dealing with communication service, excerpts from an illustrative number of them are reproduced here for the convenience of the Board:

Award No. 3902:

"The scope rule of the applicable Telegraphers' Agreement, insofar as it affects the present case, provides that the agreement applies to all telephone operators except switchboard operators. Rule 1, Agreement 1940. While our previous decisions hold that the use of the telephone in the transmission or reception of messages, orders, or reports of record is the work of the telegraphers, it is not the only work included within the Telegraphers' Agreement. In addition to telegraphers' work as traditionally defined, it includes, of course, all classifications of employes specifically negotiated therein whatever the nature of their work may be."

Award No. 4249:

"The Organization contends that the Agreement was violated when an employe not covered by the Telegraphers' Agreement was permitted to transmit a communication of record by telephone.

It has been determined by numerous awards of this Division that the transmitting or receiving of messages, orders or reports of record by telephone in lieu of telegraph constitutes work within the Telegraphers' Agreement and belongs to telegraphers exclusively. Awards 3199, 3397. The instructions sent by telephone in the present case fall within the class designated as 'messages, orders, or reports of record' and constituted work belonging to the telegraphers."

* * * * *

"The use now made of the telephone was not contemplated when the Agreements were made. When the Telegraphers' Agreement was first made, it was not contemplated that the telephone would largely supersede the telegraph. But on the other hand, work was

[fol. 25]

reserved to the telegraphers and, if the contention now advanced by the Carrier were to obtain, the work of telegraphers would amount to little or nothing. In the absence of the negotiation of new Agreements to meet these fundamental changes brought about by the increased use of the telephone, this Board was called upon to interpret the Agreement in the light of these new conditions. In so doing it has been held by numerous awards of this Division that telegraphers did not fall heir to all telephone work because it largely supplanted the telegraph, but that a logical interpretation of the Agreement and the evident intent of the parties when the Agreement was made, was that the transmission of messages, orders or reports of record was the work of telegraphers whether transmitted by telegraph or telephone."

Award No. 4458:

"It is the rule, established by the decisions of this Board, that the use of the telephone in lieu of telegraph in communicating or receiving messages, orders or reports of record, is work belonging exclusively to Telegraphers. Awards 1983, 3114, 4280. The work here involved was clearly a report of record as that term is used in the established rule. The track supervisor, not being under the Telegraphers' Agreement, had no right to the work. The agent-telegrapher was available and should have been called. An affirmative award is in order."

Award No. 4516:

"The Scope Rule of the Telegraphers' Agreement does not purport to specify or describe the work encompassed within it. It sets forth the class of positions to which it is applicable. The traditional and customary work of those positions, generally speaking, constitutes the work falling within the Agreement. It cannot be disputed that the classes specified deal largely with communication service. Historically, communication service on the railroads was carried on largely by telegraph. In former days, a telegraph operator was required at every point where communication service was essential to the safe and efficient operation of the railroad. Basically, the telegraphers were then composed of the large group of Morse code operators required to operate the telegraphic system which afforded the Carrier its chief means of communication. The advent of the telephone, mechanical telegraph machines, central traffic control systems, and other progressive methods of communication, has gradually reduced the work of the Morse code operator. This Board has sought to follow the communication work of the Morse code operator into the advanced methods of communication and preserve for him the work which traditionally belonged to him." (Emphasis added.)

All of this proves that (1) the printing telegraph machines have been substituted for Morse telegraph or telephone; and (2) communications service of record, whether it be by Morse telegraph, telephone, radio, or printing telegraph, along with any auxiliary service is definitely covered by the Telegraphers' Agreement. Any other conclusion would not harmonize with the accepted interpretations, meaning, intent and rulings of the most highly recognized and generally accepted authority, including your Board,

[fol. 26]

respecting the terms "telegraph" and "teletype operators" — "printer operators" and other classifications in the Scope Rule.

Award 5410 is a most outstanding award of your Board concerning the right of telegraph service employees to perform communications service similar to that here involved in this instant claim. Your Board before making the decision in Award 5410 analyzed this question from every angle and the Organization wishes to here respectfully incorporate the entire argument of the Organization and opinion of your Board as outlined in Award 5410 into the present case and make it part hereof. In Award 5410 we find your Board saying:

"We are convinced that the term 'mechanical message machine operator', a generic term appearing in the Scope Rule, encompassed the operator of a teletype machine. Teletype is a trade name identifying one of several kinds of teletypewriters and because of the great strides being made in the art of transmission, it was good draftsmanship to use a broad, general term in setting forth the coverage of the Agreement, rather than to name a specific machine currently in vogue. Webster's New Collegiate Dictionary defines 'telegraph' as follows:

'Originally an apparatus for communication at a distance by signals, now any apparatus, system or process for communication at a distance by electric transmission.'

'Telegram' is defined as 'a telegraphic dispatch.' Hence, the mechanical message machine operator, as used in this Agreement, can be said to describe a specialist within the general Telegraphers' classification, transmitting telegrams, messages, dispatches, etc.

This Board in past awards has looked to the character of the work rather than the method of performing it when interpreting Scope Rules. See Awards 4516 and 864 in particular. The parties, it would seem, have removed any need to review past awards considering tradition, custom and practice in ascertaining the Scope of the Agreement. Coverage is spelled out in clear, unambiguous language here.

* * *

The carrier further contends that because telegraphers have never been used in Traffic offices, that the contract was never intended to cover such locations. In Award 2693 we held that it is the nature of the work and not the place of its performance which determines to whom the work belongs. Here the justification for the introduction of telegraphers into the Traffic Department first occurred when the mechanical message machine was installed in that office in 1947. The employee followed the work which the Agreement gave to him. This Agreement does not specify any certain place of performance in respect to non-local messages. If the parties intended to restrict use of mechanical message machine operators under the Telegraphers' Agreement to on-line points not within one terminal, the scope rule would have been the place to express the intent."

[fol. 27]

The Order of Railroad Telegraphers, and the employees of this Carrier represented by it, has by custom, tradition, as well as by contract, the right to perform and handle the communications work here in question; the Carrier breaches that right when it assigns this work to be performed by employees of another craft.

In Award No. 2282, your Board said:

"As this Division has often said, it is assumed that **Agreements are made to be kept**. Their strict enforcement may create isolated situations which make it seem unreasonable, if not absurd, to enforce them. But it is the **integrity of Agreements** that is at stake, and unreasonable results, in isolated cases do not justify us in ignoring their plain provisions. * * * Agreements must be upheld, in order to maintain those stable and friendly relations between employe and Carrier which bargaining agreements and Boards of Adjustments, were and are designed to promote." (Emphasis added.)

And in Award No. 4747 we find this statement by your Board:

"We feel obliged to point out again, as we have before, that agreements are made to be kept and when, as here, the rights of an employe are prejudiced by their violation, it is the function of this Board to award the relief required."

The Organization submits that, in view of the evidence and opinions of competent legal authority herein cited, the action of the carrier in permitting or requiring employees not under the Agreement, to handle train orders, clearance cards and transmit and receive communications of record at Las Vegas West End Yard office, which work was formerly handled by telegraph service employees, constitutes a violation of the agreement.

The Order of Railroad Telegraphers has contracted to perform the work here involved and the principle upon which this dispute stands has been decided by your Board in favor of the employees in many previous awards. What the Carrier in fact undertakes to say in this issue is that it is privileged to use employees not under the Telegraphers' Agreement to perform work clearly covered by the Telegraphers' Scope. In truth and in fact all this was and is, a part of work contracted by the parties to telegraphers and definitely and positively is covered by the agreement extant between the parties.

The Scope Rule is understood by the parties to prohibit employees on positions in classes of service not under the Agreement from performing service covered by the Agreement, unless the position of such employe is brought within the scope of the Agreement.

All of the work in connection with an agreed classification is work covered by the Agreement by virtue of the seniority and other rules in the Agreement.

In conclusion, the Organization submits:

1. The records, facts, circumstances and rules cited clearly disclose that the work in question is work covered by the provisions of the Telegraphers' Agreement.

[fol. 28]

2. The employees covered by the 'Telegraphers' Agreement have the contractual right secured to them by the Agreement and its signed rules to exclusively perform all work which is identical with the work covered by the scope of the Agreement.
3. The Carrier permitted and continues to permit employees not under the Telegraphers' Agreement to perform the work in question at Las Vegas in violation of the rules of the Agreement.
4. It is evident and conclusive that the Carrier, acting alone, removed work from the Telegraphers' Agreement and assigned such work to others not covered by the Agreement, attempting to get around contractual requirements of the signed rules of the Agreement.
5. Employees coming under the Telegraphers' Agreement are being denied their contractual right to perform the service here involved and are entitled to be compensated for this work which they have been improperly deprived since August 25, 1952.
6. The rules quoted, as well as the awards cited, clearly show that the Carrier is violating the Agreement between the parties.
7. A sustaining award is necessary to reaffirm the rights of the telegraph service employees to perform work properly belonging to such employees.

CARRIER'S STATEMENT OF FACTS: Prior to setting forth or entering into a discussion of the factual situations around which this dispute centers, it will be helpful to point out the nature of the claims presented by the Organization which are in three parts.

The third part of the Statement of Claim, paragraph (c), merely specifies the alleged measure of damages which the Organization seeks to recover. It is premised on two separate and distinct factual situations described by the Organization in paragraphs (a) and (b) of the Statement of Claim. Neither of these situations bears any relationship to the other. Consequently, they should be reviewed separately.

The Carrier's Statement of Facts and its Position with respect to each of these situations will be presented accordingly.

CLAIM (a): The dispute involved in paragraph (a) of the claim pertains to the Carrier's method of handling train orders for westbound freight trains leaving Las Vegas, Nevada.

To handle the increased business originating in the area, the Carrier, early in 1952, began a program of construction and expansion designed to improve the freight train yard facilities at Las Vegas. Existing yard tracks were extended westward, and the operations were adjusted so that the hub of activity centered at the west end of the yard, instead of at the east end where the passenger station is located and where heavy passenger traffic made the freight train yard switching movements with yard engines undesirable.

[fol. 29]

To accommodate supervisors and employes engaged in the handling of the various functions connected with the operation of the yard, a new yard office was constructed within the terminal, at the west end of the classification yard, approximately one mile west of the passenger station. This facility has since been known and will hereinafter be referred to as the "West End Yard Office."

The telegraph office at Las Vegas is located in the passenger station. The telegraph office in turn is linked with other offices located in other buildings within the terminal by a system of underground pneumatic tubes. Using a compressed air principle, messages, letters, waybills, etc. may be placed in a carrier and sent from one point to another through the tube.

On August 25, 1952, the Carrier moved its yard office forces from the old yard office to the West End Yard Office. The change did not affect the telegraph office, which remained in the same location at the passenger station. No change in force occurred as a result of moving the yard force from the old yard office to the West End Yard Office.

The pneumatic tube connecting the old yard office with the telegraph office was removed and a new tube installed, connecting the telegraph office with the West End Yard Office. Telegraphers at the passenger station continued to handle exactly the same functions as before.

In this part of the claim we are concerned only with the handling of train orders.

Trains departing from Las Vegas, both east and west bound, are governed by Centralized Traffic Control. This system of train operation, becoming more general in its use, eliminates the need for train orders, except orders specifying restricted speed due to track and roadway conditions.

Where such systems are in operation, trains move, with respect to each other, strictly by signal indications. The only occasion for the use of train orders in such territories arises when a train is to leave the track controlled by the circuit for movement on to a branch line, or where "slow orders" requiring a reduction in the speed authorized over certain portions of the track under repairs are placed. Occasionally, orders are placed advising the train crew of the presence of unusually high or wide loads in the train.

Because of the Centralized Traffic Control operation, the train orders issued to trains at Las Vegas are extremely limited (many trains receive no orders whatever) in comparison to train orders issued in territories where trains are operated by train orders, and such train orders as are issued at Las Vegas pertain only to unusual track conditions, as heretofore noted.

Prior to August 25, 1952, trains were made up for departure from the east end of the Las Vegas yard, using a lead almost directly in front of the passenger station. Conductors received their waybills at the old yard office, reported for duty and were relieved from duty at the passenger station.

Whenever train orders were necessary, they were copied by the telegraphers at the telegraph office in the passenger station, and were received by the conductors at that point.

Subsequent to August 25, 1952, trains for departure have been made up at the west end of the yard. When train orders are necessary for trains

[fol. 30]

leaving Las Vegas, they are copied by the telegraphers at the telegraph office in the passenger station. Train orders for eastbound trains are delivered to the conductor at the passenger station. He then boards the train as it passes the passenger station.

For westbound trains which do not pass the passenger station, train orders are copied by the telegrapher at the passenger station, exactly as before. The telegrapher then places the orders in a carrier, which he inserts in the pneumatic tube. The orders are then received by the conductor at the West End Yard Office.

The conductors' register room at the West End Yard Office is approximately twelve feet from the pneumatic tube terminal. Conductors in some instances receive the carrier and remove the train orders from it. There have been instances, however, where the carrier also contained in addition to train orders, messages, letters, waybills, etc. used in the transaction of the business at the yard office, received from other offices.

In such instances, one of the yard clerks removes the entire contents from the carrier, segregating the items for yard office use from the train orders. The train orders are then placed on the counter, where they are picked up by the conductor. It is with respect to the latter process that the Organization complains.

CLAIM (b): The dispute presented in paragraph (b) of the claim is in no manner associated with the handling of train orders. It relates to an entirely different feature.

Claim (b) arises out of the Carrier's installation of machines developed by the International Business Machines Corporation (referred to hereinafter as "IBM machines"), to handle the preparation of wheel reports, consists, manifest and manifest passing reports, and other clerical statements and records at Las Vegas which were formerly prepared and handled manually by clerical employees at the yard office.

The Car Record Bureau at Las Vegas, located in the West End Yard Office, employs the following machines:

(1) ONE IBM ALPHABETICAL KEY PUNCH MACHINE

These machines punch holes in a card to correspond with information to be used by associated equipment to achieve various results in subsequent operations.

The holes are cut by the machine manually, by an operator using a keyboard similar to a typewriter keyboard.

The work performed by the key punch operator is the same as the work performed by a typist, except that where the typist produces the information on a typewritten page, the key punch operator transfers the information to a punched card.

The operation of the alphabetical key punch is a manual operation; that is to say, the result achieved by the machine, i.e., a punched card, occurs as a result of manipulation of the device by human hands.

[fol. 31]

(2) TWO IBM TAPE CONTROLLED CARD PUNCH MACHINES

This machine produces the same result as the alphabetical key punch, i.e. a punched card containing certain information.

The machine is activated by electrical impulse from a series of codes on a punched tape. When the tape is fed into the machine it automatically punches cards to correspond with the information on the tape.

The tape controlled card punch machine differs from the alphabetical key punch in the respect that its operation is completely automatic.

(3) TWO IBM CARD CONTROLLED TAPE MACHINES

This machine using punch cards punches the tape referred to in (2) above.

The punched cards are placed in the machine and the switch turned on. The cards then feed automatically through the machine, producing the punched tape.

The machine is completely automatic—the result which it achieves requires no human activation; it occurs entirely as a result of electrical impulse induced by holes in the punched cards.

(4) ONE IBM SORTER MACHINE

The function of this machine is to segregate the punched cards into different classifications so that the information desired may be secured by inserting the cards in any particular classification into some other machine.

The sorting technique is automatic. It makes possible the immediate grouping and listing of cars by railroad, by type, by series, etc.

(5) ONE ALPHABETICAL ACCOUNTING MACHINE

This machine, in the same manner as the others, is completely automatic and is activated by punched cards. When the punched cards feed through the machine, the information represented by the holes punched in the cards is printed on a form.

The machine is used primarily for compiling the wheel report, formerly typewritten; although by changing the panel, switch lists, lists of certain types of cars handled or any special report required by the company covering car handling may be secured.

(6) ONE IBM ALPHABETICAL INTERPRETER

Since it would be impractical for the employees engaged in the car handling processes to interpret the information on the

[fol. 32]

cards merely from the holes punched, the cards are fed through the "interpreter." The result is the printing across the top of the cards of the information represented by the holes in the cards.

This machine is automatic in operation.

- (7) **TELETYPE MACHINES:** This auxiliary equipment functions completely automatically in conjunction with the car handling system. For the receipt and distribution of information used in the car record processes, two teletype receiving printers and one teletype transmitter have been installed adjacent to the Car Record Bureau. Attached to the receiving printers are two teletype reperforators.

The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point. At the receiving point it produces information on a printed page. Using the same impulses, and simultaneously to the printing of the information on paper, the reperforator punches a tape on which information corresponding to that shown on the printed page is reproduced.

The tape produced by the reperforator is then used to produce punched cards by the process described in Item (2) above.

The teletype transmitters operate in the same manner: The tape produced electrically from cards by the process described in Item (3) is inserted in the teletype transmitter. Electrical impulses imposed by the code on the tape activate the teletype transmitter. The machine produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point.

A reperforator at the distant point of reception duplicates the information on a tape and the entire procedure is repeated.

The Car Record Bureau is staffed by clerical employees as follows:

8:00 AM to 4:00 PM

- 1 Chief Clerk
- 1 Head Machine Operator
- 1 Machine Operator

4:00 PM to 12:00 MN

- 1 Head Machine Operator
- 1 Machine Operator

12:00 MN to 8:00 AM

- 1 Head Machine Operator
- 1 Machine Operator

[fol. 33]

The machines involved in the car record process at Las Vegas, the work functions performed by the employees at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office at Salt Lake City.

In another submission on file with this Division, involving the use of IBM machines to handle car record procedures at its Salt Lake City North Yard Office, the Carrier has explained in minute detail the operation of the machines involved, the work functions performed by employees incident to their operation, and the nature of the work involved.

The procedure at Las Vegas is in all respect identical.

To avoid unnecessary repetition, the Board is invited to again review the Carrier's Statement of Facts in the Submission in the dispute between the same parties involving car record procedures at Salt Lake City North Yard, wherein a complete detail of the facts upon which the Organization's Claim (b) is based is set forth. That material is incorporated by reference in this submission.

In a letter dated October 20, 1952, written by General Chairman Herrera to Assistant to Vice President F. C. Wood, claims based on the circumstances set forth above were filed with the Carrier, wherein it was alleged that —

"A condition exists at Las Vegas wherein employees not embraced by the terms of the Telegraphers' Agreement are delivering train orders and clearance cards direct to train crews. This is in violation of the Scope Rule and Rule 62 of the Telegraphers' Agreement."

A copy of General Chairman Herrera's letter of October 20, 1952, is attached, identified as "Carrier's Exhibit A."

A conference between the parties was held at Salt Lake City November 6, 1952 to discuss the claims submitted by the Organization. The parties were unable to reach a satisfactory basis for disposition, and the Organization's claim involving the handling of train orders was denied by the Assistant to Vice President for reasons set forth in his letter of November 17, 1952 to General Chairman Herrera, copy attached, identified as "Carrier's Exhibit B."

On November 21, 1952, the General Chairman in a letter written on that date, copy attached, identified as "Carrier's Exhibit C," informed Assistant to Vice President Wood that his decision rendered on the claim involving the handling of train orders was not satisfactory to the Organization, indicating that the claim would be progressed further under the Railway Labor Act.

On December 5, 1952, the Assistant to Vice President was informed by General Chairman Herrera in a letter written on that date, copy attached, identified as "Carrier's Exhibit D," that the Organization's claim involving the handling of train orders at Las Vegas and its claim involving the use of IBM machines to handle car record information at Las Vegas would be further progressed as one dispute.

[fol. 34]

In addition to the assertions made by the General Chairman in his letter of October 20, 1952 (Carrier's Exhibit A) pertaining to the handling of train orders, the Organization contended —

"Effective October 5, 1952, the Telegraphers' Agreement has been further violated at the Las Vegas west end yard office by permitting or requiring clerical employes to transmit and receive consists of trains, manifest reports and other communications of record by means of teletype machines, transmitters and other mechanical telegraph machines, work which is clearly reserved to telegraphers by the Scope Rule of our Agreement."

The claim of the Organization which relates to the use of IBM machines to handle car record information at Las Vegas was also discussed by the parties in the conference held at Salt Lake City November 6, 1952, in conjunction with a claim submitted by the Organization covering the same system at the Salt Lake City North Yard and wherein similar contentions had been advanced.

Following the conference, the claim of the Organization involving the use of IBM machines at Las Vegas was denied for reasons set forth in a letter dated November 10, 1952, written by Assistant to Vice President Wood to General Chairman Herrera (The claim involving the same operation at Salt Lake City North Yard was denied in the same letter), a copy of which is attached, identified as "Carrier's Exhibit E."

Subsequently, arrangements were made for a study of the IBM operations at Las Vegas to be undertaken jointly by representatives of the Carrier and the Organization, and this study was made on February 24, 1952 by Assistant to Vice President Wood and Local Chairman J. W. Parker, representing the Organization.

The survey confirmed —

1. The handling of train orders for westbound freight trains leaving Las Vegas in the manner described herein; and
2. The use of IBM machines by clerical employes to handle reports and records formerly prepared manually by them in long-hand or by use of typewriters.

POSITION OF CARRIER:

- I. Unless notice is given to interested parties, the National Railroad Adjustment Board is without jurisdiction to hear and determine the portion of this dispute covered by Paragraph (b) of the Statement of Claim.

The dispute presented by Paragraph (b) originated with the Carrier's adoption of a new and modern system of handling car record information in the West End Yard Office at Las Vegas. Both the new method and the old one it supplanted have been detailed in the Statement of Facts.

The new method provides for the handling by mechanical media many of the common yard office procedures formerly performed manually by clerical employes. It also eliminates much of the manual handling of the

[fol. 35]

procedures brought under mechanization. This was its purpose — to provide for a more efficient operation.

Discussions and handling of this case on the property indicate the Organization's claim does not have its source in the process itself. The Carrier does not understand the contention of the Organization to be that telegraphers should be provided to perform new work originating with the institution of the process or that telegraphers should be provided to perform manually those functions which are now handled automatically by the I.B.M. machines.

It is evidently clear that the claim is based upon the actual performance of work, i.e., the remaining work functions which could not be mechanized and which remain to be performed manually by the Carrier's employees. The question then is apparently concerned with the Carrier's method of assigning the work involved. The Organization claims the right to replace the clerical employees now engaged in the manual performance of certain work at the West End Yard Office at Las Vegas with employees covered by the Telegraphers' Agreement. To sustain this position, the Telegraphers' Organization must necessarily and does lay claim to the exclusive right to perform certain clerical work presently being performed (and properly) by clerical employees who are represented by the Clerks' Organization.

It cannot be effectively denied that for this Board to sustain the claims here presented —

(a) would be to deny these clerical employees their rights to this service;

(b) would abrogate the agreement negotiated between the carrier and the Clerks' Organization, and

(c) would seriously affect, by such action, the rights of the clerical employees and the Clerks' Organization.

For all of these things to occur without this Board giving the requisite notice to the affected or involved employees is clearly unlawful. Certainly it is not in accord with the Railway Labor Act. Section 3(j) of the Act provides:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employees and the carrier or carriers involved in any dispute submitted to them."

In construing Section 3(j) of the Railway Labor Act, the Courts have steadfastly held that awards rendered by the various Divisions of the National Railroad Adjustment Board are void and of no effect where notice required thereby to interested parties has not been given and where such interested parties have not been given an opportunity to be heard.

On April 20, 1942, the First Division, National Railroad Adjustment Board, rendered Award No. 6640 sustaining the contention of the Brotherhood of Railroad Trainmen that work which had been traditionally performed by train porters should be transferred to brakemen. In *Hunter v. A.T. & S.F.*

[fol. 36]

Ry. Co., 78 F. Supp. 984, the District Court enjoined the enforcement of First Division Award 6640 and held that it was:

"* * * void because it was rendered without notice to plaintiffs who were involved in the subject matter thereof, within the meaning of the Railway Labor Act, Section 3 (j) and because the proceedings conducted by the said Board preliminary to issuing the Award were outside the presence of the plaintiffs, who were not given an opportunity to be heard or represented before the Board; * * *. Compliance with Award No. 6640 will deprive plaintiffs of their property rights without due process of law in violation of the 5th Amendment of the Federal Constitution."

The Court of Appeals for the Seventh Circuit affirmed the District Court in 171 F. (2d) 594. In a subsequent opinion in this case, 188 F. (2d) 294, the Court of Appeals, in dealing with the question of "involved" employees before the Board, said at pages 300-301:

"In spite of adverse court rulings the Adjustment Board apparently persists in the practice of giving notice only to the named parties to a proceeding. In many cases such a notice is insufficient. We so held on the previous appeal of this case. * * * To say that the train porters are not involved in a dispute which may result in brakemen supplanting them in their jobs is so unrealistic as to be absurd. Surely the employee who has a certain job is as much interested in that job as another employee who is trying to take it away from him."

In *Templeton vs. A.T. & S.F. Ry. Co., et al*, 84 F. Supp. 162 First Division Awards Nos. 6635, 6636, 6637, 6638 and 6639 were held to be:

"* * * illegal and void, in that they were rendered by said Board, in violation of Section 3 (j) (Title 45 USCA 153 (j) of the Railway Labor Act, because plaintiff and the members of the class whom he represents involved in said proceedings, were given no notice thereof, or afforded an opportunity to be heard therein, either in person or by counsel."

In the case of *Missouri-Kansas-Texas Railroad Co. v. Brotherhood of Railway & S.S.Cl.*, C.C.A. 7 (1951), 188 F.2d 302, the subject matter of the suit was a series of Awards which had been rendered by the Board pursuant to proceedings before it filed by the Clerks and the Telegraphers involving the same jobs. In all the proceedings before the Board the Carrier took the position that binding and conclusive awards could be rendered only after notice had been given to all whose rights might be affected. The Board ignored the carrier's position and gave notice only to the organization filing the claim and the carrier against whom it was filed. Thereafter the Board, with a referee sitting, found the Clerks' claims to be valid and ordered the positions in question assigned to the Clerks. Some time later the Board, with a different referee sitting, sustained the claims of the Telegraphers to the same jobs which were involved in the previous Clerks awards. Thereupon the carrier filed suit to enjoin the enforcement of the awards. The trial court concluded that it was the duty of the Board in the Clerks' dockets to give notice of all hearings to the Telegraphers and to all individual employees involved in the disputes and to hear their contentions as one dispute before making any awards or orders and similarly, in the matter of the Telegraphers' claims, it was the Board's duty to give notice to and hear the Clerks

[fol. 37]

and all employees involved, and that the carriers were entitled, in each case, to have those duties performed by the Board and, in failing to perform such duties, the Board violated the Railway Labor Act, and denied the carriers due process of law. The Circuit Court of Appeals for this Circuit, in affirming the decision of the trial court, said (pp. 305-306):

"The dilemma here posed results in large part from the refusal of the Board to bring both groups of claimants before it in one proceeding. Judging from a number of opinions accompanying awards and orders which were introduced as evidence in this cause, it appears to have been generally assumed that the Board has no authority under the Act to consider two agreements simultaneously, each in the light of the other. However, we are convinced from our examination of the Act that it does not require such construction. It has been stated that the rules of the Board which it is authorized to promulgate under Section 3, First (u) forbid such procedure. However, we have been cited to no such rule and doubt its existence in view of the fact that it appears that the Board itself has generally deadlocked on the question, with the carrier members consistently upholding the view that where a claim is filed against a carrier by a labor group contemplating the ousting of other employees in favor of the claimant, those other employees sought to be ousted have a vital interest in the proceeding and, under Section 3, First (j) of the Act, a right to notice and opportunity to participate in the hearing before the Board. The labor members have with equal consistency denied this contention. We think logic and reason support the carrier's construction of Section 3, First (j) which provides that the Board shall give due notice of all hearings 'to the employee or employees and the carrier or carriers involved in any disputes submitted to them.' We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees." (Emphasis supplied.)

The latest court case involving this problem is *Illinois Central Railroad Company vs. National Railroad Adjustment Board, Third Division et al* (U.S.D.C. Northern District of Illinois, Civil Action No. 53 C 1245, July 3, 1953.) The findings of fact, the conclusions of law and preliminary injunction entered in this case, which are not yet reported, are attached as Carrier's Exhibit F.

Attention is invited to paragraphs 4 to 9 inclusive of the conclusions of law and to the preliminary injunction, reading as follows:

"4. The Third Division, National Railroad Adjustment Board, in failing to give due notice of any and all hearings or proceedings in said Docket TE-5722 has failed and neglected to accord the individual presently filling the position at Palestine, Illinois, which is in controversy in said Docket, and the organization representing the craft of which he is a member, due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

"5. The custom and practice of the National Railroad Adjustment Board, Third Division, of denying to individuals and organizations involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if they have not been formally served with notice of the proceeding

[fol. 38]

is a denial of due process of law in contravention of the Fifth Amendment.

"6. The failure of the Third Division, National Railroad Adjustment Board, to serve notice of the hearings or proceedings in Docket No. TE-5722 upon the individual presently filling the position in controversy and upon the organization representing the craft of which he is a member, is a dereliction of the duty imposed upon said Board by the mandatory requirements of Section 3 First (j) of the Railway Labor Act.

"7. The Railway Labor Act imposes upon the various Divisions of the National Railroad Adjustment Board the duty of serving notice of any proceeding before it upon all employees involved irrespective of whether such employees are members of the craft or class filing the claim with the Board.

"8. The notice required by Section 3 First (j) of the Railway Labor Act is jurisdictional and if the Board fails to comply with this Section of the statute it is acting without statutory authority. The National Railroad Adjustment Board may not assert its general power under the Railway Labor Act and at the same time disregard the essential conditions imposed upon it by Congress for the exercise of such power.

"9. Plaintiff has no adequate remedy at law and will suffer irreparable harm and injury unless defendants are required to comply with the provisions of the Railway Labor Act. The failure of the Board to serve the required notice will involve plaintiff in multifarious litigation. The equity powers of this Court are adequate to afford the relief herein sought by means of a mandatory injunction and should be exercised in the circumstances herein referred to.

* * * * *

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION, and WILLIAM H. CASTLE, R. M. BUTLER, CLAUDE R. BARNES, C. P. DUGAN, J. W. WHITEHOUSE, E. T. HORSLEY, J. E. KEMP, G. ORNDORFF, R. SARCHETT and J. H. SYLVESTER, as members of and constituting the THIRD DIVISION of said BOARD, and DONALD F. McMAHON, acting as Referee and Member of said Board by direction of the National Mediation Board, are enjoined from proceeding in Docket No. TE-5722 unless and until they give formal notice to D. A. Shears, 708 North Howard Street, Robinson, Illinois, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, and permit said persons to participate in the proceedings in said Docket No. TE-5722, * * *"

In this case, the United States Government moved to dismiss and stated in its Memorandum of Points and Authorities supporting such motion that:

"While the United States does not condone the failure to give notice to the individual employee now performing the dis-

[fol. 39]

puted work, and believes any award in favor of the Telegraphers would be void in a proper suit concerning the award, it respectfully submits, for the foregoing reasons, that the complaint herein should abate and be dismissed for failure to state a cause of action."

Even without the requirements of Section 3 First (j) of the Railway Labor Act, the failure of this Board to serve notice of the proceedings before it on all of the employees affected or "involved" will constitute a denial of due process and violate the Fifth Amendment to the Constitution of the United States. The essential elements of "due process of law" are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case and a tribunal having jurisdiction of the cause. **12 American Jurisprudence, Section 573, page 267.** Notice is particularly required as essential to due process where the proceeding is of a judicial nature affecting the property rights of citizens and it cannot be denied but that the job rights and other rights incidental to employment are property rights.

The National Railroad Adjustment Board has also followed this sound principle. In Third Division Award 5432, Referee Jay S. Parker, after a careful review of all of the authorities, stated:

"Therefore we bow to the inevitable and, notwithstanding what may be found to the contrary in any of our previous awards, hold that this case cannot now be heard on its merits because it appears from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, representing employees having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future."

See also the following awards:

First Division	Second Division	Third Division	
14837	1523	5433	5781
14903	1524	5599	5785
	1525	5600	5790
	1526	5627	6051
	1527	5644	6052
	1640	5751	6072
		5959	

Third Division Awards 5432 and 5433, both decided by Referee Jay S. Parker, concerned themselves with substantially identical factual situations as are here involved. In each of those cases, as noted above, this Division dismissed the claim.

Third Division Award 6051 (Referee Thomas C. Begley) involved this same Telegraphers' Organization and this Carrier (South-Central District). Again the claim was dismissed.

[fol. 40]

Of particular significance to this dispute is this Board's holding in Award 5627 (Referee Hubert Wyckoff). In that award (Docket TE-5487), the Telegraphers' Organization and the New York, New Haven and Hartford Railroad were involved and identical contentions concerning the same work were there advanced by the Organization. The car record system on this Carrier employs the same devices and the same techniques as are found on the New Haven. The process on this Carrier, which is patterned after that on the New Haven, was placed into operation only after fairly extensive surveys of the system in operation on that railroad by this Carrier's representatives. The same principle there employed by this Board in dismissing this claim should be controlling here.

Without such notice, the Board is without authority to assume jurisdiction of and decide the issue, other than to deny it, since other interested parties, whose rights existing under other agreements would be seriously affected by a sustaining award will not have been given the notice as required by Section 3 (j) of the Railway Labor Act.

II. The Claims Presented in Paragraphs (a) and (b) Are Without Merit.

(1) The Dispute Referred to in Paragraph (a) of the Statement of Claim:

The subject matter of handling train orders is not a new one to this Division. Many awards have been rendered on the subject.

The train orders involved in this dispute are transmitted by the train dispatcher to a telegrapher located in the passenger station, who copies the train orders. The train orders for westbound trains are then placed in a small carrier, inserted in a pneumatic tube and are received at the West End Yard Office approximately one mile away, sometimes by the conductor, who removes the train orders from the carrier, and sometimes by a clerical employe, who removes the train orders from the carrier along with its other contents, placing the train orders for the conductor on the counter separating the yard office from the conductors' register room.

Telegraphers are not, nor have they ever been, employed in either the old or the West End Yard Office at Las Vegas.

Upon these facts as they are disclosed by the record and in the light of the Board's awards relating to the handling of train orders, the question raised by the Organization presents two aspects requiring the Board's study:

1. Is it a violation of the Telegraphers' Agreement for telegraphers to copy train orders, delivering them directly to the conductor by using a pneumatic tube?
2. To the extent that the function performed by the clerical employes at the West End Yard Office may be regarded as "handling train orders," does such handling violate the Telegraphers' Agreement when the handling does not occur at a telegraph or telephone office where an operator is employed?

Should question (2) be decided in the affirmative, a secondary question is raised concerning the penalty to be applied for such violations.

[fol. 41]

The rights of telegraphic service employees to handle train orders are granted by Rule 62 of the Agreement between the Company and the Order of Railroad Telegraphers, effective January 1, 1952, reading as follows:

"Rule 62. Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

The term "handle" as it is used in Rule 62 and other rules of similar construction has been interpreted to mean the copying of the train orders and the delivery of the orders to the conductor. This concept of the rule is derived from the language which the rule employs, and which provides:

"No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders * * *"

The application generally accepted is that no other employe may be used; hence, the limitations imposed by this portion of the rule pertain to persons and not to devices.

There is no rule in the controlling Collective Bargaining Agreement, nor has there been a ruling handed down by this Division, which holds that train orders must be passed by hand from the telegraph operator to the employes who are to execute them. Rather, the rule has been construed as preventing another person not covered by the agreement (the rule also permits handling by train dispatchers) to receive the orders from the telegraphers at an office where telegraphers are employed, and to then carry them to some other point where telegraphers are employed for delivery.

This Division, although moving within the somewhat restrictive boundaries of the rule, in deciding questions regarding the handling of train orders have steadfastly given consideration to the practical needs of railroad operation. It is clear that it was never intended to eliminate the use of such a device as is used here to effectuate the delivery of train orders. To do so would require the immediate discard of a device used for delivering train orders, as old as the train order method of operation itself: the train order hoop.*

On some carriers, another common device is used for the delivery of train orders. This medium consists of a platform constructed near the track at the point of delivery, with two horizontal arms, between which the train order can be suspended on a string. The train order copied by the telegrapher for delivery to a passing train is then tied to a string and suspended on the stationary platform to be picked up by the engineer and conductor of the train to which the order is addressed.

The use of such devices to assist telegraphers in delivering train orders to employes to whom they are addressed has long been recognized as proper under the agreement and since the purpose accomplished by the pneumatic

*To anyone familiar with railroad operation, the use of the train order hoop need not be explained. Its purpose is to permit a telegrapher to deliver a train order to a passing train without stopping the train to permit hand to hand delivery.

[fol. 42]

tube is precisely the same, it cannot be said that its use is in violation of the telegraphers' right to handle train orders.

An extreme but nevertheless convincing analogy between the accepted method of delivering train orders by using the train order hoop, when the operator places the train orders in a clip on the bamboo hoop,* holding it by the handle for delivery to the engineer or conductor, who removes the orders from the hoop, and the use of the pneumatic tube, where the telegrapher copies the train order and places it in a carrier to be received directly by the conductor.

Both devices accomplish the same purpose. For example, the same end would be achieved if the handle of the train order hoop was long enough to span the distance covered by the pneumatic tube. The method of "handling" the train order would be the same.

The installation and use of the pneumatic tube does not supplant any of the work performed by the telegraphers at Las Vegas incident to the handling of train orders, customarily regarded as work reserved to that craft by their agreement. Telegraphers still copy and deliver the train orders at Las Vegas, as formerly.

The first aspect of the question raised by the Organization concerning train orders may be disposed of by analyzing the method used in making the delivery in the light of the term "handle" as it appears in Rule 62 and as it has many times been interpreted by this Division.

The rule as interpreted does not prohibit the use by telegraphers of train order hoops, train order forks, stationary train order delivery platforms, pneumatic tubes or other devices to effect delivery of train orders. The rule, in reserving the work, refers not to devices but only to —

"No employe other than * * *"

Since the use of the pneumatic tube takes no work away from the telegraphers' craft, no more so than any of the other devices commonly used for the same purpose, and in the absence of any regulation prohibiting its use, it clearly follows that in the circumstances where the train order is copied by the telegrapher, placed in the tube and received directly by the conductor at the West End Yard Office, no violation of the Agreement occurs because the train order has at no time in the operation been handled by employes other than those covered by the Telegraphers' Agreement and the train dispatcher.

The second aspect of the question requires further study.

The contention here is that the use of a clerical employe at the West End Yard Office to remove the orders and place them on the counter to be picked up by the conductor violates the rights granted to employes of the telegraphers' craft to handle train orders.

It should, perhaps, at this point be made clear that the performance of this extremely minor function is purely one of convenience and practical

*Some carriers now use the high speed delivery fork, where the train order is suspended on a string between "V" shaped sticks attached to a handle held by the telegrapher.

[fol. 43]

operation. Quite frequently, when trains require train orders, they are sent to the point of delivery prior to the time the conductor reports for duty. Where the train orders are received along with other items for use by the yard office clerical forces, the train orders are removed by the clerk, along with the other contents. Rather than replacing the train orders in the receptacle in which they are received, for subsequent removal by the conductors, it has been customary, as a convenience, to place them on the counter for the conductor, thus saving the conductor the need for taking them out of the receptacle a second time, himself.

Even so, such handling does not violate the Telegraphers' Agreement as it has been interpreted and applied by the parties and as it has been interpreted by this Division.

In dealing with the claims' other aspect, we studied the first part of Rule 62, which limits the handling of train orders to certain individuals.

The Organization has sought unsuccessfully to have the rule construed in such a manner as to limit the handling of train orders to telegraphers and train dispatchers in all instances. The rule, however, is not so restrictive.

Rule 62 of the controlling agreement provides that —

"No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders * * *

The rights conferred by the rule, however, are by the same rule confined to —

"* * * telegraph or telephone offices where an operator is employed and is available or can be promptly located * * *."

The latter stipulation is clearly an exception within the rule in that it does not grant an exclusive right to handle train orders at all points. The rule authorizes the handling of train orders by persons other than those named in the rule at points other than —

"* * * at telegraph or telephone offices where an operator is employed and is available or can be promptly located * * *."

Under the rule established and steadfastly adhered to by this Division, we must treat as reserved to the Carrier all rights which are not granted to the employes, by the Agreement: Awards 2132 (Referee Thaxter), 2491 (Referee Carter), 2622 (Referee Parker), 4304 (Referee El Kouri), 4322 (Referee El Kouri), 5331 (Referee Robertson), 5897 (Referee Dougherty).

The controlling agreement contains a specific rule covering "Train Orders." In it the Carrier did bargain away to a limited extent some of its inherent rights to have train orders handled by any employe in any manner. It was, however, only in the specific and limited manner set forth in the train order rule.

The Carrier agreed that train orders would be handled by telegraphers only —

"* * * at telegraph or telephone offices where an operator is employed and is available or can be promptly located * * *."

[fol. 44]

Since the Carrier did not at the same time bargain away its right to have train orders handled by other employes at points where operators are not employed, that right must be treated as reserved to the Carrier.

The parties have mutually so construed the rule in applying it on this property. On October 23, 1944, the Employees' General Chairman wrote the Carrier's General Manager as follows concerning the intent of the train order rule:

"We take the position that the schedule is violated when other than the operator is permitted to handle train orders where an operator is employed, and for that reason we consider the claim is legitimate under the provisions of Rule 68 and should be allowed."

The case under discussion at that time concerned the handling of a train order by an employe other than a telegrapher or train dispatcher at a phone booth where an operator was not employed, about a mile and one-half from the telegraph office.

A conference was ultimately held to discuss the claim, at which time it was agreed that the handling occurred at a point where a telegrapher was not employed. The General Manager pointed out concerning the conference:

"Our discussion in this case went more to the question of the proper application of Rule 68 of the schedule, and particularly the language,

'No employee other than covered by this schedule and the train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed.'

"It is particularly significant that the rule uses the language, 'at telegraph or telephone offices.' The intention appears clear as a prohibition against clerks, trainmen or others handling train orders in the office where an employe coming under the schedule is employed.

"The circumstances forming basis of the claim of Telegrapher Robinson do not fit into that picture. Conductor McKay copied Order No. 175 for his train at the telephone booth located about a mile and a half from the telegraph office. As I advised you, I do not consider Operator Robinson has any proper claim in this case."

The claim was withdrawn and closed.

In the handling of subsequent questions involving the rule, the Organization agreed that Rule 62 was not violated where conductors handled train orders at points where operators were not employed because as the Employees' General Chairman stated in his letter of October 6, 1944 —

"Rule 68* would not cover for the reason an operator is not employed at telephone booths between open telegraph offices."

*Rule 68 of the agreement then in effect was the same as present Rule 62.

[fol. 45]

In a recent case submitted to this Division by this same Petitioner, Docket No. TE 5854, Award No. 6071, the Organization sought to have this long-standing interpretation of the train order rule and the customs and practices thereunder set aside, and to have the rule apply in such a manner as to grant telegraphers the right to handle train orders at all points, even at points where operators are not employed, notwithstanding the express language of the rule providing otherwise.

The claim in Docket No. TE 5854, which involved the handling of a train order at Boise Junction, a point where an operator is not employed, by an employe other than a telegrapher, was denied. This Division, in its Award No. 6071, rejected the proposition of the Organization and upheld the Carrier's right under the rule to have train orders handled by employes other than telegraphers and train dispatchers at offices where telegraphers are not employed.

The Carrier is aware of and has reviewed the awards of this Division rendered on the subject of handling train orders, viz. 86, 709, 1096, 1167, 1168, 1304, 1456, 1489, 1713, 1719, 5013, 5087, 5122 and 5872.

Some of these awards are based on the 'Telegraphers' Scope Rule; some on train order rules similar to Rule 62 of the controlling agreement. All support the right of telegraphers to "handle" train orders, although almost without exception, dissents to the Division's findings have been filed. In each case, however, the award was based upon a factual situation where the telegrapher copied a train order which was then delivered by another employe not covered by the agreement to the conductor addressed at another point where there was an operator employed.

As such, these awards are clearly distinguishable from facts and circumstances here involved where the so-called handling occurred at a point where there are no operators employed. The claim here is based on Rule 62. This Division in its Award No. 6071 involving the same parties, and which is controlling, held that the rule was not violated where employes other than telegraphers handle train orders at points where telegraphers are not employed.

The second aspect of the question raised by the Organization with respect to train orders is therefore equally as unmeritorious as the first. Here it is contended that the use of an employe other than a telegrapher to handle train orders at the West End Yard Office violates Rule 62 of the Telegraphers' Agreement.

Telegraphers are not employed at the West End Yard Office. It follows that a violation of the Agreement could not, therefore, occur at the point, since Rule 62 permits the use of employes other than telegraphers to handle train orders at points where telegraphers are not employed.

In the analysis of Rule 62, there remains only the question of penalty for the violation of its provisions.

In submitting its claim to the Carrier, the Organization presented it in the usual manner, i.e., eight hours' pay for an unnamed idle employe.

The Carrier has repeatedly called the attention of this Committee to its obligation under the Railway Labor Act to submit claims which name the claimant, setting forth the facts upon which his alleged loss is based.

[fol. 46]

This Division has repeatedly dismissed claims which by their vague and indefinite nature preclude an accurate determination of merit.

Aside from this, there is absolutely no basis for a claim for eight hours' pay. Such a penalty could be awarded only if the agreement expressly provided for such a penalty. Here the agreement does not so provide.

The Organization's claim in paragraph (a) is based on an alleged violation of Rule 62 of the agreement. That rule stipulates that where its provisions are violated —

“ * * * the telegrapher will be paid for a call.”

The Carrier submits that Rule 62 was not violated. Even if this were so, there is no proper basis for the payment of a penalty of eight hours. The maximum penalty which could in any event be asserted or awarded would be a call. That is the penalty provided by the rule itself. A greater penalty could not be awarded without rewriting the rule, and the Board has many times held that such a function is not within its jurisdiction.

The complete inconsistency of the Organization's claim is demonstrated in paragraph (c). The claim made there for “the equivalent of a day's pay for each eight hour shift” is based upon alleged violations of the agreement, said by the Organization to have occurred out of the circumstances set forth in paragraphs (a) and (b).

The claim for compensation is made —

“ * * * since August 25, 1952, the date of which the new yard was placed in service * * * ”

although the use of IBM machines in the West End Yard Office at Las Vegas, the condition upon which the Organization's Claim (b) is based, did not begin until October 28, 1952, over two months after the date of the Organization's claim. Even the date of October 5, 1952, used by the Organization in submitting the claim on the property pre-dated by 23 days the actual existence of the events upon which they were based.

The Carrier submits that its method of handling train orders at Las Vegas does not violate Rule 62 of the Telegraphers' Agreement and that Claim (a) of the Organization should be denied.

(2) The Dispute Referred to in Paragraph (b) of the Statement of Claim:*

This part of the Organization's claim involves the Organization's attempt to have this Board direct the Carrier to replace, with telegraph employees, the clerical employees now engaged in the handling of car records and other yard office clerical functions in the Las Vegas West End Yard Office by use of mechanical devices known as IBM machines.

This part of the Organization's claim is identical to the dispute presented to the Board involving the North Yard office at Salt Lake City, Utah, and

*The Carrier's discussion of the merits of Paragraph (b) of the Organization's Statement of Claim is not in any sense a waiver of the Carrier's jurisdictional objection set forth in Part I of the Carrier's Position herein.

[fol. 47]

the Carrier's position on the merits set forth in its Response to Notice of Ex Parte Submission in that docket is equally applicable to Paragraph (b) of the Organization's claim in this docket. The Carrier's position in the Salt Lake City case is incorporated herein by reference and is made a part of this submission.

It has been demonstrated in this submission that —

- (1) The dispute covered in Paragraph (b) of the Organization's claim should be dismissed; and
- (2) In any event, there is no merit to either of the Organization's Claims (a) and (b).

For the reasons set forth herein, the Carrier submits that the Organization's claims in this docket should be denied.

All information and data contained in this Response to Notice of Ex Parte Submission is a matter of record or is known by the Organization.

OPINION OF BOARD: The procedural question of giving a third party notice has been fully disposed of. Therefore, these claims will be considered on their merits.

The employees states that prior to August 25, 1952, the Carrier's freight and communication activities were located in and near the passenger station at Las Vegas. A telegraph office was located in the passenger station building. Telegraphers employed in that office handled all train orders, delivering them directly to the crews of all trains in both directions. The telegraphers also performed all the communication work normally associated with the operation of such a terminal. Exchange of the messages, consists, and other items involved in the communication work, between the telegraph office and the yard office was accomplished by means of a pneumatic tube. On August 25, 1952, the Carrier extended its freight facilities about a mile west of the passenger station. A new yard office was built at the west-end of the new yard and was open for business on August 25, 1952. This office is known as the West-End Yard Office. The necessary clerical force was moved from the old yard office near the passenger station. Instead of providing for telegraphers at the new yard office, a new pneumatic tube was installed to connect the existing telegraph office with the new yard office. This device apparently was used for the same purpose as the one it replaced. But in addition, it was also used to effect delivery of train orders to the crews of those trains which departed from the new West-End Yard Office. The grievants object to the use of the tube, contending that their right to deliver train orders to the crews addressed is thereby violated. The telegraphers perform the usual work involved in the handling of train orders, that is, they copy them in manifold, repeat to the dispatcher to check for mistakes, accept responsibility for their proper delivery to the crews addressed, and prepare the copies for delivery. However, instead of actually delivering the orders to the crews in the usual manner, and as required by the Carrier's operating rules, the telegraphers are obliged to place the orders, along with other material, in the pneumatic tube carrier. This pneumatic tube carrier substitutes for human messenger. It carries the papers to the West-End Yard Office where they are received by a clerk. The orders are then delivered to the crews by the yard clerk, who takes them out of the pneumatic tube.

[fol. 48]

The issue presented in Claim (a) by the employes is simply whether employes outside of the scope of the Telegraphers' Agreement may properly be required to deliver train orders.

As we stated in Award No. 6071, this is not a new issue and while the awards are conflicting, there is unanimity upon the proposition that where, as here, the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreement.

Rule 62 reads as follows:

"Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

From a careful reading of the record before us, we find that no telegrapher is employed at the West-End Yard Office. Therefore, the Carrier has not violated Rule 62 of the effective Agreement. The record also shows that the telegrapher performs every duty that he has performed in the past, with the exception of personally handing to the crews of those trains which depart from the new West-End Yard Office the train order. The Scope Rule of the Telegraphers' Agreement does not give to them this work of personally handing to the crew these train orders. Rule 62 states that they have the exclusive right, except in emergency, of the handling of the train orders at stations where telegraphers are employed. Custom and practice show that employes other than telegraphers have handled train orders at offices where the telegraphers are not employed, and as they are not employed at the West-End Yard Office the Carrier did not violate the Agreement.

The employes state that sometime after August 25, 1952, the Carrier placed in service at the West-End Yard Office a number of electro-mechanical devices, the purpose of which is to compile records which are necessary to the operation of the Carrier's freight trains, and to communicate those records to other offices, some of which are located many hundreds of miles from Las Vegas. Before the change was made, the purely clerical work, that is, the compiling, typing, writing, of the required records and reports was performed by clerks; and the communication work, that is, the transmission by telegraph, teletype, telephone was performed by telegraphers. The new machines are semi-automatic, requiring a human operator to set the machines in motion and to feed them the material which results in communication of intelligence between distant points. The employes object to this use of clerical employes, who are not subject to the Telegraphers' Agreement, to perform the work required to make these machines function as communication devices and thus divert work from the telegraphers.

The Carrier states that it installed certain IBM machines at its West-End Yard Office to handle the preparation of wheel reports, consists, manifest and manifest passing reports, and other clerical statements and records at Las Vegas which were formerly prepared and handled manually by clerical employes at the yard office. The Card Record Bureau at Las Vegas, located in the West-End Yard Office, employs the following machines:

- (1) One IBM Alphabetical Key Punch Machine
- (2) Two IBM Tape Controlled Card Punch Machines

[fol. 49]

- (3) Two IBM Card Controlled Tape Machines
- (4) One IBM Sorter Machine
- (5) One Alphabetical Accounting Machine
- (6) One IBM Alphabetical Interpreter
- (7) Two Teletype Receiving Printers and
One Teletype Transmitter

The machines involved in the Card Record process at Las Vegas, the work functions performed by the employees at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office in Salt Lake City. The question of the use of these machines at the Carrier's North Yard Office at Salt Lake City was decided in Award 8656 on January 12, 1959 and that Award denied the claim made by the employees. The key to the entire IBM system is the punch card in which holes are punched either manually or automatically from a punched tape to correspond with certain information which the associated equipment uses in the compilation and reproduction of various reports and records. The new system was put into effect by the Carrier on October 28, 1952. No part of the process as it pertains to the receipt and transmission of information on the teletype printer machines occurs as a result of activation of any device by the employees of the IBM Card Record Bureau — the process is entirely automatic.

The Board finds that Award No. 8656 stated:

"A careful review of the record does not support petitioners' claim that other employees of the Carrier are performing work belonging exclusively under the Telegraphers Agreement. Rather such work as telegraphers might otherwise perform or might have rights to under the Agreement is now performed not by other employees but by the automatic operation of the machines in question.

"The Division has not supporter the proposition that when an automatic machine is installed to perform a certain function, the employee who previously performed that function is entitled to remain simply to watch the automatic machine operate. * * *

We are in accord with what was said in Award No. 8656 in that the Division has not supported the proposition that when an automatic machine is installed to perform a certain function, the employee who previously performed the function is entitled to remain idly by and watch the automatic machine operate. However, from the evidence produced at the hearing in this docket, we find that these machines are not automatically operated. To the contrary, we find that the clerks who are now operating these machines must place these perforated cards in the machine, then push a button and then the machine operates.

The record shows that under the Telegraphers' Agreement the Scope Rule states that the agreement will govern the wages and working conditions of teletype operators and printer operators. The record also shows that even though the Scope Rule does not give to the telegraphers the exclusive right to perform this work, they have exclusively performed the work, in the past, of teletype operators and printer operators.

The Carrier states in this submission when it refers to the number of machines that it has installed at the West-End Yard Office at Las Vegas,

[fol. 50]

that it has installed teletype machines and its gives in detail the work performed by these teletype machines. The Carrier states that the teletype machines function as follows:

"This auxiliary equipment functions completely automatically in conjunction with the car handling system. For the receipt and distribution of information used in the car record processes, two teletype receiving printers and one teletype transmitter have been installed adjacent to the Car Record Bureau. Attached to the receiving printers are two teletype reperforators.

"The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point. At the receiving point it produces information on a printed page. Using the same impulses, and simultaneously to the printing of the information on paper, the reperforator punches a tape on which information corresponding to that shown on the printed page is reproduced.

"The tape produced by the reperforator is then used to produce punched cards by the process described in Item (2) above.

"The teletype transmitters operate in the same manner: The tape produced electrically from cards by the process described in Item (3) is inserted in the teletype transmitter. Electrical impulses imposed by the code on the tape activate the teletype transmitter. The machine produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point.

"A reperforator at the distant point of reception duplicates the information on a tape and the entire procedure is repeated."

The Carrier, by its own admission, states that the tape produced electrically from cars by the process described in Item 3 is inserted in the teletype transmitter. This tape is inserted by a clerk and it is work which comes under the Telegraphers' Agreement. The teletype receiving printer is also work that comes under the Telegraphers' Agreement and has been performed in the past by telegraphers and not by clerks. The tape at a distant point that is transmitted to the teletype receiving printer must be inserted by someone to activate that machine.

In Award No. 8656, the Board found that the work was not performed by other employees, but by the automatic operation of the machines in question. We find that the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office is performed by an automatic operation of the machines in question, but is activated by a clerical employee. Tape-producing machines activate by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher.

The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office.

The Carrier shall compensate the senior idle employee covered by the Telegraphers' Agreement for the equivalent of a day's pay for each eight-

[fol. 51]

hour shift since October 5, 1952 at the Telegraphers' applicable rate to that particular location for each day or shift that the two teletype receiving printers and the one teletype transmitter was used at that location.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violate as stated in the Opinion.

AWARD

Claim (a) denied.

Claims (b) and (c) sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1961.

DISSENT TO AWARD NUMBER 9988, DOCKET NUMBER TE-6800

This docket involves two separate claims based on different alleged Agreement violations. Part (a) involves a claim arising out of the handling of train orders by other than telegraph employees, and Part (b) involved the Carrier's utilization of automatic IBM machines in its mechanized car record procedures.

In this Award 9988, which was adopted by a majority composed of the Referee and the five Labor Members, the Board correctly finds that Part (a) of the claim should be denied, that the manner in which train orders were handled at Las Vegas was not in violation of the Telegraphers' Agreement. The Board correctly holds that the ultimate personal delivery by clerical employees of train orders to the train crew members does not violate the so-called Train Order Rule, and, further, that "the Scope Rule of the Telegraphers' Agreement does not give to them [telegraphers] this work of personally handing to the crew these train orders." This holding represents a correct reading of the applicable Agreement provisions and a proper adherence to this Board's prior decision in Award 6071 (Referee Begley) involving the same Agreement provisions, the same Carrier and the same problem.

This dissent is not directed to the Board's action as to Part (a) of the claim. We do dissent, however, to the Board's erroneous action in sustaining Parts (b) and (c).

[fol. 52]

The dispute presented in Part (b) of the claim involved the Carrier's use of the IBM machines and is the same, identical dispute which was presented to and denied by this Division in a companion docket, TE-6799, resulting in denial Award 8656 (Referee Guthrie).^{*} The parties in the two dockets are the same, the same Agreement is involved, and, save for the fact that here the dispute arose at Las Vegas, Nevada, instead of Salt Lake City, Utah, the facts of the two disputes are identical in every respect. The results achieved by the IBM machines here and those in Award 8656 are the same in every detail. None of this is open to question because the record in the two dockets is the same, identical record, both the Carrier and the Telegraphers' Organization having incorporated in this docket the factual statements, arguments and contentions set forth in their respective submissions in Docket TE-6799 (Award 8656). In sum, the dispute here and in Award 8656 are one and the same dispute.

The Board has recognized the identity of the dispute in the two dockets. In fact, we find the Board reciting from and concurring with the very statements in Award 8656 which formed the basis for the Board's denial of the Telegraphers' claim that its Agreement had been violated in the utilization of automatic IBM machines. Thus, while approving Award 8656, the Board comes to a conclusion directly opposite to that reached in Award 8656 and finds that the Carrier's action in the same, identical circumstances was a violation of the Telegrapher's Agreement! One may well ask: "How can this be?" Unfortunately, the answer to this question cannot be found in the Board's Opinion in Award 9988 nor in any logical or reasonable appraisal of the record in this case. The instant decision is simply not explicable on the basis of the record before the Board. The explanation, if any, must be found elsewhere.

It will be our purpose in this dissent to point out the serious errors in the instant award. At the outset we point out that, apart from any consideration of the merits of this automation aspect of the dispute, the Board's inconsistent action in denying the claimed violation in Award 8656 and sustaining the claimed violation in Part (b) here, strikes at and challenges the very basis of the Board's position in railroad labor relations as intended under the Railway Labor Act.

The Board's action here leaves the Carrier and, for that matter, the employees, in an unworkable situation. In Award 8656 this Board, in a decision from which there was no dissent, found that the Carrier's manner of operation in its mechanized car record procedures did not violate the Telegraphers' Agreement. This Board stated:

"A careful review of the record does not support petitioner's claim that other employees of the Carrier are performing work belonging exclusively under the Telegraphers Agreement. Rather such work as telegraphers might otherwise perform or might have rights to under the Agreement is now performed not by other employees but by the automatic operation of the machines in question."

That was on January 25, 1959. For nearly three years both the Carrier and the Organization have operated under such award. Almost three years later,

^{*}Both Docket TE-6799 (Award 8656) and Docket TE-6800 (Award 9988) were companion cases and were originally handled together with Judge Robert G. Simmons in April 1954 on the Third Party Notice issue. They were not disposed of at that time, and the dockets later became separated.

[fol. 53]

this Board reverses itself, and this same Carrier and its employees are now told in Award 9988 that clerical employees are performing work belonging to telegraph employees in violation of the Telegraphers' Agreement. Such a situation is intolerable and makes for an instability flatly contrary to the clear intent of the Railway Labor Act. Further, all carriers are charged by Congress in the Interstate Commerce Act with the duty to conduct their operations in an efficient manner. The Board's action makes such objective impossible.

It has long been axiomatic with the National Railroad Adjustment Board that to fulfill its function of dispute settlement a uniformity of interpretation of labor agreements is essential. To interpret the same contract one way in one award and then in the exactly opposite way in another only serves to create further disputes involving the identical issue.* The Board has recognized this sound principle and held that unless an award is "palpably wrong" there is never any warrant in overruling, in a subsequent dispute between the same parties, a previous award construing the same provisions of their Agreement. See Award 8104 (Referee Guthrie) and 7968 (Referee Elkouri) as representative on this question.

Moreover, this Division in Award 9435 (Referee Begley) held:

"This Referee is in accord with the thinking of the Referee who sat with the Third Division in rendering Awards 9254 and 9255, wherein he states that he 'considers the use of the words "without prejudice" unfortunate if they were intended to convey the meaning urged by the Carrier'. However, this Referee is also inclined to follow precedent on the point of issue, particularly in view of the Railway Labor Acts' requirement that where no money award is concerned, as in the present case, the Board's Awards shall be final and binding upon both parties to the dispute."**

In an article which appeared in the July 1959 *Railroad Telegrapher*, Mr. J. M. Willemin, attorney for the Telegraphers' Organization, stated:

"When a collective agreement rule has been construed, the interpretation of that particular rule becomes, so to speak, a part of the agreement as though it had been written into the agreement in the first place. The interpretation thus becomes a vested right, and should not, except for very clear, positive, and cogent reasons, be subsequently changed. The parties to any agreement have the right to change the same at any time, in conformity with the provisions of the Railway Labor Act."

This observation finds sound roots in the Railway Labor Act, itself, which provides at Section 3, First (m) that awards of this Board of the type of Award 8656 are "final and binding" upon the parties.

One would have thought, then, that in view of Award 8656 there would have been no question as to the disposition to be made in the identical dispute

*In Award 8656 the Board found that the use of the transmitting tele-type machines at Salt Lake City was not in violation of the Telegraphers' Agreement. The Board now says that it is a violation to automatically receive a communication at Las Vegas from Salt Lake City, although it has held that there was no violation in its transmission from Salt Lake City!

**All emphasis is supplied unless otherwise indicated.

[fol. 54]

in Part (b), that the Board would recognize it should be denied. Such action would have been in accord with what the Telegraphers' Organization, itself, has said. The interpretation of the Telegraphers' Agreement which was made in Award 8656 became "so to speak, a part of the agreement * * * a vested right". The Board recognized and followed this principle in denying the claim put in Part (a), and its failure to do so as to Part (b) goes a long way down the road in destroying confidence in the ad hoc adjudicatory processes envisaged by the Railway Labor Act. This is especially true where no attempt was made to show that Award 8656 was "palpably wrong" and the Board in its Opinion here does not even attempt to advance any reasons, let alone "clear, positive and cogent" reasons for not following the previous interpretation.

And it must be remembered, the situation here was unique — this was not simply a case of the Board following sound precedent — here we had the identical dispute presented on the same record.

The foregoing discussion is made without regard to the merits of this dispute to which we now turn.

(1) Even a casual reading of the Board's Opinion discloses such inconsistent and inaccurate statements as to demonstrate a lack of understanding of the issues tendered in this dispute.

In Award 8656 this Board, upon the identical record, found and held that clerical employees were not performing work which belonged exclusively to Telegrapher employees. This Board found that "such work as telegraphers might otherwise perform or might have rights to under the Agreement is now performed not by other employees but by the automatic operation of the machines in question."

In the instant Award 9988, this Board (page 4) recognizes, as, of course, it must, that —

"The machines involved in the Card Record process at Las Vegas, the work functions performed by the employees at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office in Salt Lake City."

and on the same page, this Board also finds —

"No part of the process as it pertains to the receipt and transmission of information on the teletype printer machines occurs as a result of activation of any device by the employees of the IBM Card Record Bureau — the process is entirely automatic."

The Board then states:

"We are in accord with what was said in Award No. 8656 in that the Division has not supported the proposition that when an automatic machine is installed to perform a certain function, the employee who previously performed the function is entitled to remain idly by and watch the automatic machine operate." (Last paragraph, page 4, Award 9988)

[fol. 55]

Then follows the almost unbelievable and wholly inconsistent statement —

“* * * we find that these machines are not automatically operated.”

This is not all. Subsequently, on page 6, the Board says:

“We find that the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office is performed by an automatic operation of the machines in question, but is activated by a clerical employee.”

The Board also stated:

“The new machines are semi-automatic, requiring a human operator to set the machines in motion and to feed them the material * * *.” (Award 9988, page 3, second paragraph)

The Board thus demonstrates its inconsistency on a point which is crucial to its ultimate determination. At one place it says the machines are automatic and concurs with prior Award 8656 to that effect, and then in the next breath proceeds to say they are not “automatic” but are “semi-automatic” because someone has to start the machines. Then, in further confusion, it concedes that the machines “automatically operate.” It is regrettable to find inconsistency as between some of the awards of this Division. To find inconsistency within the same award is indefensible.

Further misunderstanding is also shown at the bottom of page 4, where the Board, in purporting to distinguish this case from Award 8656, said —

“To the contrary, we find that the clerks who are now operating these machines must place these perforated cards in the machine, then push a button and then the machine operates.”

Then on page 6, first paragraph, reference is made to the fact that the machine-produced tape is inserted in the teletype transmitter and —

“This tape is inserted by a clerk and it is work which comes under the Telegraphers’ Agreement. The teletype receiving printer is also work that comes under the Telegraphers’ Agreement and has been performed in the past by telegraphers and not by clerks. The tape at a distant point that is transmitted to the teletype receiving printer must be inserted by someone to activate that machine.”

It is thus impossible to determine whether it is the insertion of the cards or the tape or both which the Board is considering. The Carrier is thus left in a real quandary. Further, the Board’s concern over what is done at the “distant point” (see last sentence of above quotation) when this dispute concerned only the machines at Las Vegas indicates a serious lack of understanding as to what was involved here.

The Board’s inconsistent and erroneous statements in its Opinion in Award 9988 show it to be “palpably wrong,” valueless as precedent and, in addition, of doubtful legal validity.

(2) We will subsequently discuss the Board’s confusion as to the term “automatic.” We discuss at this point the purported basis for its

[fol. 56]

erroneous statement that these machines are "not automatically operated", but that they are "semi-automatic." In the last paragraph on page 4, after indicating that it was "in accord" with Award 8656, the Board stated:

"However, from the evidence produced at the hearing in this docket, we find that these machines are not automatically operated. To the contrary, we find that the clerks who are not operating these machines must place these perforated cards in the machine, then push a button and then the machine operates."

Thus, the Board admits that this "evidence" furnished the basis for its purported distinguishing of this case from that involved in Award 8656, a task which was surely necessary to the sustaining of Part (b) of the claim in this docket.

The "hearing" referred to in the Opinion was the hearing which was held before the Third Division with the Referee sitting with the Division as a member thereof. As everyone knows, such a hearing, with the Referee present, is not a hearing in the usually accepted sense of that word. It is supposed to be an oral argument to the Board on the record in the dispute before it. For the Board to have accepted, considered and relied upon any "evidence" at the referee hearing which did not appear in the written record was flatly contrary to this Division's rules and regulations, and we submit such action by the Board has destroyed the Award's validity.

In the letter which this Board sent the parties advising of the hearing before the Board with Referee Begley, it was stated:

"The hearing is for the purpose of orally reviewing and arguing the evidence already presented. The Third Division is not disposed to accept evidence not heretofore presented." (Letter dated March 1, 1961)

Moreover, even with the initial hearing before the Third Division, the Division's Executive Secretary in his notice of hearing advised the parties:

"In consideration therewith you are hereby advised that the Third Division is not disposed to admit known evidence at an oral hearing which has not theretofore been presented for consideration by the interested parties during negotiations between them in their undertaking to adjust the dispute without petition to the Adjustment Board." (Letter dated April 9, 1956)

Such instructions are, of course, premised on the Board's original regulations issued as Circular No. 1, October 10, 1934:

"Hearings. — Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

"The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."

(These regulations are codified in the Code of Federal Regulations, Title 29, Chapter III, Part 301.)

[fol. 57]

The record in this docket upon which Award 9988 was rendered, was by the parties' own stipulation, the identical record before the Board in Docket TE-6799, Award 8656. For the Board to consider anything not contained therein was a flagrant violation of its own rules.

All familiar with the Board's procedure are aware of the Board's rule. Indeed, at the start of the hearing which was held in this docket with the Referee present, the Chairman of the Division admonished both parties of the Board's rule in this regard. This was reiterated during the hearing.

The Board, having provided that no evidence will be presented or considered at hearings, must adhere to its own rules. While this situation is not commonplace, an Agency violating its own rules has been considered and condemned by the Courts. In *Sangamon Valley Television Corp. v. United States* (1959), USCA-DC, 269 F.2d 221, the Court of Appeals held —

"Agency action that substantially and prejudicially violates the agency's rules cannot stand."

This case involved an application for a television license. The Federal Communications Commission had set a time limit on the filing of written statements favoring or opposing the application and provided that no additional statements would be accepted thereafter. Contrary to such rule, the applicant for the television channel filed ex parte statements and discussed the application with the Commissioners individually after the time the Agency had set for the filing of written statements had passed. In that case, unlike the situation here, there was no showing that these statements furnished the basis for the Commissioners' decision. See also, *Service v. Dulles* (1957), 354 U.S. 363, 388, where the Court said:

"While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."

(3) The Board, in its erroneous attempt to distinguish this case, infers that the Referee in prior Award 8656 did not understand the meaning of the word "automatic". Because the machines must be activated, we are told that they are not "automatic" but instead are "semi-automatic". The Board's distinction is without merit, whatever "evidence" is considered.

The word "automatic" has historically been subjected to various changes in meaning, but within recent generations has acquired stable senses. It is correctly applied to the automatic machines under consideration here, which are so constructed that when certain conditions have been fulfilled, i.e., place plugs in proper jacks, punched cards and perforated tape in the desired position, and push the button which turns on the power, they operate indefinitely without supervision until the conditions have materially changed. The conditions have materially changed, of course, when one operation for which the machine were set is completed and another set-up is made. Thus, under the stable sense of the word as defined in Webster's Dictionary of

[fol. 58]

Synonyms (1951)* these machines are in fact entirely "automatic", and not merely semi-automatic. See Awards 4063 (Referee Carter), 6416 (Referee McMahon) 8656 (Referee Guthrie), 9313 (Referee Howard A. Johnson), 9333 (Referee Weston), 9611 (Referee Rose).

According to Award 9988, there can be no automatic machines except perhaps a perpetual motion machine, and even that must at least once be activated. As far as we know, all automatic machines require some outside action to start them or commence their operation. But Award 9988 says that any machine which needs starting by an outside source is only "semi-automatic". It is on the basis of this mistaken and long since rejected view of automation that the Board proceeded to make Award 9988 flatly contrary to Award 8656.

The argument that an automatic machine is not automatic when it requires human action to start its automatic action has been recognized as specious a number of times. In Award 1008 (Referee Mills), this Board said that—

"Every automatic operation requires human thought and action to release it."

More recently, in Award 6416 (Referee McMahon), the Board rejected the argument that an automatic elevator was not automatic because it was still necessary to push a button to activate the elevator.

This dispute cannot be disposed of on the basis of labels. Even though these machines be mistakenly labeled as "semi-automatic", there is still no basis to conclude that the Telegraphers' Agreement was violated. The mere insertion of a tape or activation of an automatic teletype machine is not in this situation work which comes under the Telegraphers' Agreement. The violation here charged was premised on allowing clerks to "operate printing and/or mechanical telegraph machines." Merely to start a machine is not to "operate" it. Rather, to "operate" a machine is to perform work on it, and here the Board recognized that the "work performed" on the two teletype receiving printers and the one transmitter is "performed by an automatic operation of the machines in question." (Page 6, second paragraph)

This dispute was not concerned with the activation of an automatic machine. Not once in the handling of this matter before the Board did the Organization premise its claim on any alleged right to merely activate the

*"Automatic has historically been subjected to various changes in meaning and has only within recent generations acquired stable senses. Originally, it was used to describe a thing that was self-acting or self-activated because it contained the principle of motion within itself. 'In the universe, nothing can be said to be automatic' (Sir H. Davy). Now in the sense here considered, it is applied to machines and mechanical contrivances which, after certain conditions have been fulfilled, continue to operate indefinitely without human supervision or until the conditions have materially changed; thus, an automatic firearm is so constructed that after the first round is exploded the force of the recoil or gas pressure loads and fires round after round until the ammunition is exhausted or the trigger is released; a thermostat is an automatic device which maintains the temperature of artificially heated rooms by operating the appropriate parts of a furnace when the temperature exceeds or falls below the point at which it is set."

[fol. 59]

machines, and the mere act of inserting the IBM perforated tape into the automatic teletype machines was never discussed in the record. The Board in this dispute has erroneously equated "operation" with "activation".

The dissenting Labor Member's distinction in Award 9913 between operating a machine and the mere act of turning it on and off points up the error in the statement in Award 9988 that:

"The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office." (Page 6, next to last paragraph)

The error in the Board's conclusion is further compounded because of its failure to distinguish between the transmitting and receiving machines. The record here is barren of even an attempted showing that clerks at Las Vegas have any duties whatsoever in activating the receiving teletype machines at that point. Award 9988 now says that it is a violation of the Agreement to automatically receive the tape at the West End Yard Office where no clerical employee participates in the activation of the receiving machines*, yet it was perfectly proper and not in violation of the Agreement to utilize the transmitter machine at Salt Lake City which, in fact, automatically activates the receiving machines at the West End Yard Office at Las Vegas in addition to other places. The Board in its Award 8656 is telling the Carrier it is not a violation of the Agreement for clerical employees to activate the transmitter machine and then "operate" it at Salt Lake City but in Award 9988 it decides that it is a violation of the Agreement at the West End Yard Office at Las Vegas for the Carrier to utilize the automatic receiving machines where no employee has anything whatsoever to do with their operation.

The mere act of inserting the IBM perforated tape is not and does not have essentially a communication purpose. The record here shows, without denial by the Organization, that the primary purpose of the machine arrangement was the performance of what is undisputedly a clerical function, i.e., the creation of a compiled typewritten list of matters which are both to be retained as records at the Las Vegas office, as well as being transmitted to other distant points. As pointed out by the Carrier and quoted by the Board at page 5, the teletype "produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point." Thus, with the accomplishment of the clerical function, the incidental communication function was automatically performed without any infringement whatsoever of any Telegrapher's rights. This was also the case in Award 9913 (Referee Begley). It was, in fact, recognized in Award 9913 that where an alleged communication function is automatically performed as a simultaneous concomitant of the performance of a recognized clerical function, telegraphers' rights are not thereby impaired or violated, and that there is no requirement that such automatic functions should be removed from the machines. While in that case the Board was referring to the production of perforated tape as an automatic result of the physical act of typing reports by clerks on manual teletype machines, the same principle is even more applicable where the automatic

*See first sentence of second quoted paragraph at Page 5 of the Board's Opinion — "The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point." No one at Las Vegas even turns these machines on.

[fol. 60]

preparation and compilation of clerical reports simultaneously results in the automatic transmission thereof. (Even if the act of inserting the tape and activating the teletype could be said to be merely a semi-automatic act, it was nevertheless for the purpose of completing a recognized clerical function, and the simultaneous transmission and communication results were still themselves a mere automatic incident of that clerical function.) All of this was recognized by President G. E. Leighty in his discussion of these automatic machines in his report to the "Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers" which was held in Chicago, Illinois, in June 1960. In discussing these machines, Mr. Leighty stated at page 192 —

"As inevitably occurs in the case of an invention, it is greatly improved upon as time passes and that has been very true of the mechanical telegraph machine. The International Business Machine Company brought to the railroad industry the IBM machine in the last few years, which can combine the work of the clerical employee, for example, who before prepared the communication and gave it to the telegrapher to transmit, and the work of the telegrapher, because it actually transmits the communication which formerly was transmitted by the telegrapher. Thus, as the clerk does the work on the IBM which he formerly did on the typewriter, preparing a communication for transmission, this machine at the same time cuts the tape the simpler machine (the teletype) used to cut in the telegraph office, and with the assistance of reperforators or a wire chief in combining circuits, this clerk can also in most cases from his clerical station do the actual transmitting in one operation."

We have seen that although the Board said that the machines are "not automatic" it recognized (page 6, second paragraph) that the actual communication work was performed by the automatic operation of the machines:

"* * * the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office is performed by an automatic operation of the machines in question * * *"

We submit that if the "work performed" is "performed by automatic operation of the machines" there can be no performance of such work by clerical employees so as to violate Telegraphers' rights. This inescapable conclusion cannot be avoided by saying that the machines are "activated by a clerical employee" and thus the Telegraphers' Agreement was violated.

(4) We now turn to the Board's very serious and presumptuous error in Award 9988 in directing the Carrier as to how it shall conduct its operations and to rewrite the Telegraphers' Agreement accordingly — all in accordance with its own ideas of what should be done but without any lawful basis whatsoever.

The authority of the Board is limited by law to interpreting the Agreement between the parties. The Board is without authority to attempt to direct the operation of the Carrier in any manner. As was stated in Award 8967 (Referee Carter) —

"It is the prerogative of Management to determine the manner in which the work shall be performed * * *. It may use any

[fol. 61]

method it sees fit to correct violations without any restraining directives by this Board."

When the Board here says that —

"Tape-producing machines activated by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher." (Award 9988, page 6, second paragraph),

it goes far beyond its statutory authority and is contrary to fundamental principle. Apart from rules governing its procedures, this Board does not possess any rule-making power.

Furthermore, the dictum that "Tape-producing machines activated by clerks may not be used to reperforate tape" is not only contrary to Award 8656 covering the identical dispute, but is contrary to the previous awards of this Division involving teletype and similar machines on other carriers, the most recent award being Award 9913 (Referee Begley) rendered by the Board constituted as here, as well as Awards 9005, 9006 (Referee Daugherty), 9454 (Referee Grady), and 8538 (Referee Coburn).

Moreover, the Board's "directive" as to the manner in which IBM produced tape is to be used by this Carrier erroneously infers that the IBM machine produced tape was produced by a clerk. This is completely at odds with the facts and the record. The tape was produced by the automatic IBM machines, howsoever activated, and was not produced in any sense of the word by a clerk. This Board knows better. In Award 9913 (Referee Begley) where the teletype was actually physically operated by a clerk it was still recognized that the tape was "automatically made when the consists, messages, reports, etc., are typed out by the clerks [on teletype machines]."

This Board may erroneously determine to sustain this claim; it cannot, however, determine that a tape producing machine may not be used to reperforate tape* or be connected to through circuits, or that such tape cannot be inserted in a transmitter by other than a Telegrapher. The Board's statement is all the more serious upon the realization that in the entire handling of this matter the Telegraphers' Organization never even indicated that the Carrier was limited in its use of the tape producing machines or the tape produced thereby.

(5) The Board's Opinion as to Part (b) also shows a refusal to correctly read and comprehend the plain language of the Scope Rule of the Telegraphers' Agreement. The Opinion states:

"The record shows that under the Telegraphers' Agreement the Scope Rules states that the agreement will govern the wages and working conditions of teletype operators and printer operators. The record also shows that even though the Scope Rule does not give to the telegraphers the exclusive right to perform this work, they have exclusively performed the work, in the past, of teletype operators and printer operators." (Page 5)

*This was precisely involved in denial Award 9913.

[fol. 62]

The Scope Rule includes teletype operators and printer operators, but its coverage is clearly limited to such positions as are "herein listed." Then, under "Rule 5, General Telegraph Offices," the Agreement lists "4 Las Vegas 'VG'" followed by the positions and rates. The "West-End Yard office" is not listed. Compare the Opinion in Award 8538 (Referee Coburn):

"Does the currently effective Agreement provide that the work involved here [i.e., operation of teletype machines] is exclusively telegraphers? The Scope Rule includes certain designated positions 'and such other positions as may be shown in the appended wage scale or which may hereafter be added thereto.'

* * * * *

"Petitioner's position is untenable for several reasons. First, there is no evidence in this record that printer clerks were performing such 'identical work.' Manifestly this would have been impossible because no teletype machines were in use in these locations prior to September 1, 1953. Second, while the wage scale appended to the agreement does list printer clerks and other positions in various telegraph offices on this property, the coverage of the Agreement is limited to the specific positions set out in the wage scale appendix. There is no reference to or listing of the position of printer-clerk at either the Richmond or Los Angeles offices or in other offices of this Carrier where clerical employees operate teletype machines. * * *"

Just as in Award 8538, the Agreement provisions pertinent here limit the application of the Scope Rule to Telegraphers in the listed Telegraph Offices, and there is no reference to or listing of the position of teletype or printer operator or any other telegrapher position at the West-End Yard Office at Las Vegas.

The Board in denying Part (a) of this claim had no difficulty in correctly reading the Train Order Rule which limited the exclusive grant of rights to "telegraph or telephone offices where an operator is employed." The Board pointed out, at page 3, that "we find no telegrapher employed at the West-End Yard Office," and held that since Telegraphers "are not employed at the West-End Yard Office the Carrier did not violate the Agreement." The same common-sense reading of the Scope Rule required a denial of the claim in Part (b).

(6) The Board has also failed to recognize this dispute in Part (b) as essentially nothing more than a protest against the installation of labor-saving machines — automation. Carrier correctly argued in this docket that such protests were not proper subjects of the adjudicatory system under the Railway Labor Act and that the Board was without jurisdiction thereover. It was pointed out that the remedies, if any, for the economic problems posed by situations where automatic machines, howsoever activated, tend to reduce employment must be found in the field of negotiations.

Railroad labor organizations, themselves, have recognized that the proper forum to consider and deal with the impact of automation is in the field of negotiation. See, in this connection, interview with Grand President Harrison of the Brotherhood of Railway Clerks, Railway Age, July 29, 1957. More-

[fol. 63]

over, the Organization in this docket never disputed, in fact, never discussed, the Carrier's position that this was a matter for negotiation and not adjudication. This was for good reason because it has also recognized the validity of the Carrier's argument, that the dispute here is one for negotiation. President Leighty, in his Report to the 1960 Telegraphers' Convention, reviewed this entire problem. He said:

"The most prevalent type of mechanical telegraph machine used in the beginning was the teletype and while we quite generally were given jurisdiction over such machines that were used in telegraph offices, they were frequently installed in traffic and 'off-line' offices and given to other employes than telegraphers to operate and very frequently this was permitted to occur without any protest being lodged from our people because we were not manning the machines. Thus it gradually came to pass that employes in at least one other craft than ourselves were operating some of these machines. This even led at times to negotiated agreements by the railroads with the other organizations than ours which at least gave other employes some rights to the operation of this type of machine. The result was that almost universally when the National Railroad Adjustment Board was created in 1934, and we resorted to it for support of our claim to exclusive jurisdiction, we failed to receive it from that body.

* * * * *

"These improvements have in this way created a situation where a composite operation on the IBM machine takes place, consisting partly of work formerly performed by the clerical employe and part that the telegrapher previously performed but now no longer performs. As arbiters such as the NRAB were almost universally holding that neither craft had exclusive jurisdiction over these new and improved machines, it seemed useless to continue our claim that exclusiveness was ours, while at the time the machines were being placed by most carriers in the offices of clerical employes to operate, leaving us with nothing but a claim.

"Accordingly I revised our policy and began to claim instead that we have an equity in what in fact is a composite operation where these IBM and teletype machines are used. So far as railroad managements were concerned, I have found they have quite generally been willing to entertain this new type of claim and to make agreements with us that give us a share in this work. The amount of work performed on these machines is quite often greatly expanded over what was handled where messages were moved by Morse or even by teletype only and the result is that on several roads where we were making no progress in securing exclusive jurisdiction, we are now by agreement being integrated into the composite work of both teletype and IBM machines without material loss of positions which otherwise would have resulted from the introduction of this type of communication device.

* * * * *

"* * * This improved type of rapid transmission and reception is being adopted on many railroads of the country and it was im-

[fol. 64]

perative that we get in on the ground floor of each new installation and have the management understand our policy in which we are claiming only an equity in the work in question. * * * (Page 191, Report of President G. E. Leighty to the "Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers", Chicago, Illinois, June 1960)

The Organization in effect recognizes, as it must, that what we have in this dispute is a jurisdictional dispute over a new "composite operation" resulting from the utilization of the new automatic machines. As such, the dispute should have been denied or, in any event, dismissed as being jurisdictional in nature and not properly susceptible of disposition by Board award. This type of situation was discussed and remanded in Award 4768 (Referee Stone):

"* * * Patently, the marvel of CTC types of centralized control and electrical operation was not contemplated in assigning the traditional duties to the two crafts. (Telegraphers and Dispatchers) The new task of operating a control board in part unites and in greater part supplants the duties and positions formerly assigned to each. Therefore, the matter of its proper assignment constitutes a jurisdictional dispute * * *."

See also Awards 4452 (Referee Carter), 4769 (Referee Stone), 6205 (Referee Shake), 6224 (Referee McMahon), 7299 (Referee Carter), and 8143 (Referee Elkouri).

The Board's sustaining of Part (b) of the claim awards the Telegraphers' Organization more than a mere "equity in what in fact is a composite operation" and which the Organization, itself, recognizes is properly sought at the bargaining table.

(7) The Organization in Part (c) of the claim sought, for the alleged violations, the payment of one day's pay for each 8-hour shift, day and night, since August 25, 1952. Such payments were to be made to the "senior idle employe or employes covered by the Telegraphers' Agreement." The award sustained the claim, changing the date to October 5, 1952 and adding the further limitation that payment is to be made for each shift "that the two teletype receiving printers and the one teletype transmitter was used at that location."

The claim as submitted and as sustained by the Board is vague and indefinite and for that reason alone should have been rejected by the Board. As representative on this question, see Awards 8674 (Referee Vokoun), 8500 (Referee Daugherty), 8330 (Referee Wolff), 8124, 6937 (Referee Coffey), 6885, 6760 (Referee Parker), 6529, 6528, 6486 (Referee Rader), and 6348 (Referee L. Smith). The Carrier cannot be required to search its records to determine both the dates of violation and the persons to whom such allowances are to be paid. As representative on this question, see Awards 8855 (Referee Bakke) and 9343 (Referee Begley). Moreover, it is probable that many of the Carrier's records necessary to such a determination are no longer available.

Not only is the phrase "senior idle employee covered by the Telegraphers' Agreement" so vague and indefinite as to be incapable of ascertainment, it also erroneously purports to reward many persons who were not in any way

[fol. 65]

even affected by the alleged violations.* There is no sanction for such action either in the Railway Labor Act or in the Agreement.

It is clear that the Board's order here cannot satisfy the requirements of the Railway Labor Act. In this connection see *System Federation No. 59 vs. La. & Ark. Ry. Co.*, 119 F.2d 509, where the Court of Appeals stated:

"Further finding that it was unable to determine who upon the list submitted, was entitled to relief, it yet found generally that many of the employees had been furloughed and not reemployed in violation of the rules and were therefore entitled to relief. Its findings of fact therefore, and its award, instead of being and containing the definite determinations of fact, as to the persons entitled to relief, and the relief to which they are entitled, contemplated and required by the act, consisted of merely general statements, that some of the employees were entitled to some relief, and that those so entitled should be awarded such relief as they were entitled to. The Act contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts."

For all of the foregoing reasons we dissent.

/s/ J. F. Mullen

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan

ANSWER TO DISSENT, AWARD 9988, DOCKET TE-6800

The Carrier Members' dissent is one of the most amazing documents ever to have been conceived by those masters of sophistry. Its greatest value is to document for all time the inconsistency of its authors.

First of all, they improperly describe the dispute. There was a single claim, in favor of one employe for each shift, based on an allegation that the manner in which the Carrier was effecting delivery of train orders and handling communication work at a new yard office in Las Vegas violated various provisions of the Telegraphers' Agreement.

However, it makes no material difference whether we consider the dispute as consisting of one or two claims. Many disputes involve more than one aspect and require consideration of more than a single issue.

*The Agreement here covers two districts, South Central and North-western, and extends from Los Angeles to Salt Lake City, thence up to Portland, Oregon. Any employe in that territory would be an employe "covered by the Telegraphers' Agreement." Thus, an employe at Portland, Oregon, many miles from Las Vegas, Nevada, if he be the senior idle employe on any of the three shifts on any day since October 5, 1952 is given a gift of a day's pay!

[fol. 66]

That portion of the dispute in which the Employees contended that Rule 62 was violated by the manner in which delivery of train orders was effected raised two questions: (1) Does the "handling" of train orders — which, with one exception, is restricted by the rule to telegraphers — include their physical delivery to the train crews addressed; and (2) is the new yard office at Las Vegas a place subject to the rule.

Both of these questions were improperly answered. With respect to the first question Rule 62, and the practically unbroken line of precedent awards on the point involved were completely ignored, the award merely stating — without citation of authority — that the scope rule does not give telegraphers the work of personally handing train orders to the crews. This in the face of numerous awards to the contrary which were cited to the Referee. I will take the time to note two of these:

Award 5871 (Referee Yeager):

"In all of these awards claims were sustained for acts of the carrier similar to the one complained of in this docket. It is true that in most, if not all of them, the charge was a violation of a specific prohibitory provision of the particular Agreement, as in Award 1096. In the opinions where the matter was exhaustively considered, however, the true basis of the awards was the removal of work from the Scope of the Agreements and causing it to be performed by those not covered, and not the fact that in the instances there was a prohibitory provision." (Emphasis added).

Award 5122 (Referee Carter):

"The Carrier urges that the rule is different where a telegrapher is not maintained at the point where the train order is to be delivered to the crew that is to execute it. It further urges that the method employed has been used for many years and is a practice which has been generally followed. Assuming that it did become a general method of handling under situations such as we have here, it is not controlling for the reason that the work of sending, receiving, copying and delivering train orders is reserved to telegraphers by their agreement. The delivery of train orders to a train crew by one outside the Telegraphers' Agreement, is a violation of the Telegraphers' Agreement." (Emphasis added).

These awards deal, respectively, with cases where train orders were delivered by employees other than telegraphers at a place where a telegrapher was employed but not on duty, and at a place where a telegrapher was not employed. Both of them cite numerous awards reaching similar conclusions.

The Referee, however, based his opinion on a single prior award, 6071, which he wrote himself, which did not involve a similar issue, and which has been declared erroneous by a subsequent award involving the same basic issue, the same parties and the same agreement: Award 8867.

The second question was primarily one of fact. The record shows that the parties were in agreement that the new yard office is located within the confines of Las Vegas, the Carrier twice stating that the new yard office was "within the terminal" along with the telegraph and other offices. This fact alone divested the case of any similarity to Award 6071. This fact

[fol. 67]

placed the disputed issue on all fours with Part 1 of the claim in Award 5122, even to the distance of about a mile from the telegraph office in each case.

This agreement upon the facts and applicability of Award 5122 were brought to the attention of the Referee in a special supplemental memorandum by this writer at the time of panel argument.

Both the facts and the prior awards having a proper bearing on the issue were ignored. The Carrier Members characteristically express their satisfaction with the result, which proves once again that they are not interested in establishing and maintaining a line of sound precedent awards — unless they are favorable to the carriers.

Disposition of the issue relating to the delivery of train orders by Award 9988 is erroneous. I so stated at the time the award was adopted, and reserved the right to append to the award my reasons for so holding. These comments will serve that purpose.

The balance of the Carrier Members' dissent is a rambling, repetitious attack on that portion of the award which sustains the right of telegraphers to perform communication work. Its author apparently made no effort to systematize his remarks, thus making it somewhat difficult to organize a coherent reply. Perhaps that was the reason.

One main theme of the dissent is an alleged concern over the value of precedent. They say:

"It has long been axiomatic with the National Railroad Adjustment Board that to fulfill its function of dispute settlement a uniformity of interpretation of labor agreements is essential. . . ."

They cite numerous awards and an article from the official organ of the Employees in support of their statements.

Much more authority could have been cited. Indeed, the Supreme Court of the United States has held that such uniformity is desirable. *Slocum v. The Delaware, Lackawanna and Western Railroad Company*, (339 U.S., 239).

If the Carrier Members were sincere in these contentions I would be most happy to agree with them. But they are not sincere. Precedent, to them, is sacred only when the result is favorable to them. On the same day that they issued their dissent to Award 9988 they issued a dissent, signed by the same members, to Award 9998, q.v., in which they referred to the following of precedent as "pernicious error." The precedent there was in favor of the employees.

Such inconsistency surely should make suspect anything its authors utter.

The dissenters' displeasure with Award 9988 on this point arises from their comparison of this case with the dispute disposed of in Award 8656. In that case Referee Guthrie ruled in favor of the Carrier on a finding that the machines at Salt Lake City operated automatically and thus eliminated all work belonging to telegraphers. In that respect Award 8656 was "palpably wrong", and Referee Begley properly noted the difference between his finding and that of Referee Guthrie.

[fol. 68]

The Carrier Members, in their championing of precedent, forget to mention the fact that our "axiomatic" thinking includes an exception when the "precedent" is "palpably wrong". Award 8656 is one of those cases envisaged by Referee Garrison when he wrote Point 3 of his famous memorandum to Award 1680, and thus should have been overruled.

The record here clearly shows that the machines do not operate automatically. The Carrier itself describes the operation in detail, noting — among other things — that the teletype machines require attention from someone to make them operate as communication devices. The Referee correctly found that employees not subject to the telegraphers' agreement were thus performing the work of a "teletype operator", one of the classifications enumerated in the scope rule of the telegraphers' agreement.

The effect of such enumeration in a scope rule is so well known and so compatible with the Referee's finding here that no comment is necessary.

Now let us go back to "precedent". In at least a dozen instances during the past nine years, to my personal knowledge, the Carrier Members have argued that the right of telegraphers to perform communication work is not breached as long as they are not entirely eliminated from the operation. In other words, if a telegrapher is permitted to insert a coded tape in a teletype transmitter, even though the work of coding the tape was performed by others, he has no valid complaint.

I have resisted that contention with all the energy I possess. It ignores the fact that preparation of the tape, used in most instances solely for transmission of the information involved, represents the major portion of the communication work. But the Carrier Members have prevailed in most cases.

The latest such case was Award 9913. That award was adopted over my protest by a majority consisting of the same Carrier Members who signed the present dissent and the same Referee with whom they now find fault for reaching the same conclusion in Award 9988 that he reached in Award 9913.

In other words, the Carrier Members were happy to join the Referee in denying a claim where telegraphers were permitted to insert the tape in a transmitter, but they disagree with him when he applies the same reasoning to sustain a claim where the telegraphers were not even permitted to perform that minimal amount of work.

As I have noted previously, such inconsistency is characteristic of the dissenters, and makes their dissents of little value.

Not only are the dissenters inconsistent; they also have little regard for the true facts. For example, they say in a footnote, with respect to operation of the receiving teletypes at the location in question "No one at Las Vegas even turns these machines on." No such statement appears in the record. Furthermore anyone who has even the slightest acquaintance with operation of such machines knows that they must be "turned on", that the received material must be torn off, that various other actions by human attendants are essential, and that all of these functions are included in the classification "teletype operator", an employee covered by the scope of the Telegraphers' Agreement on this property.

[fol. 69]

Another example is their quotation, out of context, of a small portion of the Report of the President of the Telegraphers' Organization to the last convention. No such references were made in the record where the Employees could have made suitable reply. The subject of the President's remarks was not stated. That subject did not include disputes such as we were here considering. If the dissenters wish to challenge this statement let them publish the full text of the President's report. But they should pay for its publication themselves just as the Organization paid for it originally.

In some respects the dissent is correct, or nearly so. The dissenters recognize the absurdity and futility of "hearings" before the referee. But let us not forget it was the Carrier who requested this "hearing", so if it served to clarify anything that was in the record to its detriment, it has no one to blame but itself. Here, we must think of the Carrier and the dissenters as little boys who initiate a game of marbles but refuse to play unless they always win.

As a matter of fact, and regardless of what the Referee's words are taken to mean, the Board did not accept or act upon any "evidence" that was not in the written record. The Carrier there stated that "The tape produced electrically from cards by the process described in Item (3) is inserted in the teletype transmitter." (Emphasis added). Also, the Carrier stated that "... two teletype receiving printers and one teletype transmitter have been installed ...". See Carrier's "Statement of Facts" in its Ex Parte Submission. These statements were made about the location involved, where no telegraphers were employed. It stands to reason that employees other than telegraphers were the ones by whom the tape "... is inserted in the teletype transmitter." This was the "evidence" referred to, and it is in the written record. It follows that the dissenters' conclusion in the following statement is wrong, although their premise is correct:

"For the Board to have accepted, considered and relied upon any 'evidence' at the referee hearing which did not appear in the written record was flatly contrary to this Division's rules and regulations, and we submit such action by the Board has destroyed the Award's validity."

The two remaining points I wish to discuss further prove the inconsistency of the dissenters.

First, the Carrier did not make the argument that:

"The Scope Rule includes teletype operators and printer operators, but its coverage is clearly limited to such positions as are 'herein listed' ...".

The Carrier Members made it, contrary to the Board's rules and their own understanding of them. The Referee correctly ignored such extraneous 'evidence' and argument.

Second, the argument raised by the dissenters in point (7) of their dissent was not advanced in the record, and thus has no proper relevance to any phase of the case. It is obviously an afterthought, designed to aid the Carrier in any effort it may choose to make to avoid full compliance with the award.

[fol. 70]

We take note of the fact that claim (c) in Award 9753, a case involving these same parties, was similar in all essential respects to claim (c) in Award 9988. The dissenters found no fault with its form there. Furthermore, the parties had no particular difficulty in reaching agreement on the payments to be made in that case. Clearly, they should have no difficulty in reaching agreement here.

I sincerely hope that neither the Carrier nor anyone else will be so misled by the dissenters' drivel that they make the mistake of taking it seriously.

J. W. WHITEHOUSE
Labor Member

[fol. 71]

NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION
ORDER—July 14, 1961

To accompany Award Number 9988
Docket Number TE-6800

To Union Pacific Railroad Company, Mr. A. D. Hanson,
Assistant to Executive Vice President-Personnel, Omaha 2,
Nebraska.

The Union Pacific Railroad Company is hereby ordered
to make effective Award No. 9988 made by the Third Divi-
[fol. 72] sion of the National Railroad Adjustment Board
(copy of which is attached and made part hereof), as therein
set forth; and if the Award includes a requirement for
the payment of money, to pay to the employe (or employes)
the sum to which he is (or they are) entitled under the
Award on or before January 1, 1962.

National Railroad Adjustment Board, By Order of
Third Division.

Chicago, Illinois.

I do hereby certify that the above is a true and correct
copy of the order accompanying Award No. 9988 in Docket
No. TE-6800.

S. H. Schulty, Executive Secretary.

June 25, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS—Filed September 13, 1963
(Oral Hearing Requested)

The defendant Union Pacific Railroad Company moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim upon which relief can be granted because plaintiff is not a proper party to bring this action under Section 3, First, (p) of the Railway Labor Act.
2. To dismiss that portion of the action seeking an accounting because the Complaint fails to state a claim upon which such relief can be granted.
3. To dismiss the action because it appears from the face of the complaint that certain clerical employes of defendant at Las Vegas, Nevada, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, AFL-CIO, their collective bargaining agent under the provisions of the Railway Labor Act, are parties indispensably necessary to a full and final adjudication of this action and none of them has been made a party hereto.

Knowles and Knowles, By E. G. Knowles, H. Lustgarten, Jr., James A. Wilcox, Attorneys for Defendant.

[fol. 73]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

REQUEST FOR ADMISSIONS—Filed November 12, 1963

To: The Order Of Railroad Telegraphers, Plaintiff:

Please take notice that the defendant hereby requests the plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit or deny within ten (10) days after service of this request, for the purposes of the above-entitled action only:

Requested Admission No. 1.

That each of the following documents, copies of which are attached hereto, are true copies of the original documents;

(a) Copy of letter dated November 10, 1960, written on the letterhead of the National Railroad Adjustment Board, Third Division, 220 South State Street, Chicago, Illinois, signed by Mr. S. H. Schulty, Executive Secretary, and addressed jointly to Mr. Geo. M. Harrison, Grand President, Brotherhood of Railway & Steamship Clerks, B. of R. C. Building, Cincinnati, Ohio, and Mr. Stanley B. Eoff, General Chairman, 529 Governor Building, Portland, Oregon, with copies to Messrs. G. E. Leighty, A. S. Herrera and A. D. Hanson.

(b) Copy of letter dated November 16, 1960, written on the letterhead of the Grand Lodge, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Brotherhood of Railway Clerks Building, Cincinnati, Ohio, signed by Mr. Geo. M. Harrison, Grand President, and addressed to Mr. S. H. Schulty, Executive Secretary, Third Division, N.R.A.B., 220 South State Street, Chicago, Illinois, with copies to Mr. G. E. Leighty, President, The Order of Railroad Telegraphers, 3860 Lin-

dell Boulevard, St. Louis, Missouri, and Mr. Stanley B. Eoff, General Chairman, 529 Governor Building, Portland, Oregon.

Requested Admission No. 2.

That the letter described in Requested Admission No. 1(b) above is the "specific disclaimer" which is referred to at page 9 of Plaintiff's Memorandum In Opposition to the Motion to Dismiss filed in the above matter on or about October 18, 1963.

Requested Admission No. 3.

That the letter described in Requested Admission No. 1(b) above is the basis by which the Clerks' Brotherhood is [fol. 74] stated to have "specifically disclaimed any interest in the dispute between plaintiff and defendant" and which is referred to at page 7 of Plaintiff's Memorandum In Opposition to the Motion to Dismiss filed in the above matter on or about October 18, 1963.

Respectfully submitted,

Knowles and Knowles, E. G. Knowles, Clayton D.
Knowles, James F. Culver, By E. G. Knowles,
H. Lustgarten, Jr., James A. Wilcox, Attorneys
for Defendant.

ATTACHMENT TO REQUEST FOR ADMISSIONS

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Chicago 4, Illinois, November 10, 1960

Certified Mail—Return Receipt Requested

Mr. Geo. M. Harrison, Grand President, Brotherhood of Railway & Steamship Clerks, B. of R. C. Building, Cincinnati 2, Ohio.

Mr. Stanley B. Eoff, General Chairman, 529 Governor Building, Portland 4, Oregon.

Gentlemen: This is notice of the pendency of a dispute before the Third Division, National Railroad Adjustment Board, identified as Docket No. TE-6800, on the petition of the Order of Railroad Telegraphers, against the Union Pacific Railroad Company, which dispute is described in the attached.

Hearing of this docket is scheduled for 10:00 AM., C.S.T., Tuesday, December 6, 1960, at Room 1830—220 South State Street, Chicago, Illinois.

Copies of the ex parte submissions are attached.

[fol. 75] You will have the right to appear and file papers and any documents you desire in answer thereto, furnishing eighteen copies thereof to the Division.

Kindly acknowledge receipt.

Yours very truly,

S. H. Schulty, Executive Secretary.

cc: Mr. G. E. Leighty
Mr. A. S. Herrera
Mr. A. D. Hanson

Grand Lodge

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Brotherhood of Railway Clerks Building, Cincinnati 2, Ohio, Geo. M. Harrison, Grand President.

File 281-19-10, Docket TE-6800, Subject—Miscellaneous Grievances—Union Pacific (W), November 16, 1960.

Mr. S. H. Schulty, Executive Secretary, Third Division, N.R.A.B., 220 South State Street, Chicago 4, Illinois.

Dear Sir: Receipt is acknowledged of your letter of November 10, 1960, giving notice of the pendency of dispute before the Third Division, National Railroad Adjustment Board, between the Union Pacific Railroad Company and The Order of Railroad Telegraphers. You advise that said dispute bearing Docket No. TE-6800 will be considered by the Third Division at 10:00 A.M., C.S.T., Tuesday, December 6, 1960, at Room 1830—220 South State Street, Chicago, Illinois.

From the description set forth in your letter and the material attached thereto, it would appear that this is a dispute between the Union Pacific Railroad Company on one hand and The Order of Railroad Telegraphers on the other hand involving the interpretation or application of the agreement between them covering the rates of pay, rules and working conditions of employees represented by The Order of Railroad Telegraphers. If this understanding is not correct, I would appreciate being further advised. [fol. 76] If my understanding of the nature of this dispute, as set forth in the preceding paragraph, is correct, please be advised that neither the Brotherhood of Railway Clerks nor the employees it represents are involved in such dispute between a carrier and the representative of another craft concerning the interpretation of its agreements between the carrier and the representative of such other craft. The rights of employees represented by the Brotherhood of

Railway Clerks are predicated upon agreements between the carriers and our organization. If, at any time, and for any reason, a carrier party to an agreement with our organization should undertake to assign work covered by such agreement to employes not covered thereby, we shall, of course, take appropriate steps pursuant to the provisions of the Railway Labor Act to correct any such violation of our agreement and to protect the employes we represent against any loss resulting from any such violation.

Very truly yours,

G. M. Harrison, Grand President.

cc: File 295-0

cc: Mr. G. E. Leighty, President, The Order of Railroad Telegraphers, 3860 Lindell Blvd. St. Louis 8, Missouri.
Mr. Stanley B. Eoff, GC, 529 Governor Building, Portland 4, Oregon.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

PLAINTIFF'S RESPONSE TO REQUEST FOR ADMISSIONS—

Filed November 27, 1963

Comes Now the plaintiff and makes each of the admissions requested of it in defendant's Request for Admissions served upon counsel for plaintiff on November 8, 1963.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys
for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE ORDER OF RAILROAD TELEGRAPHERS, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Civil No. 8107

MEMORANDUM OPINION AND ORDER—July 15, 1964

Chilson, Judge.

This is an action to enforce an award of the National Railroad Adjustment Board.

[fol. 77] The matter is before the Court upon a motion to dismiss, based on three grounds:

1. That the plaintiff is not a proper party to bring this action;
2. That the portion of the action seeking an accounting fails to state a claim upon which relief can be granted;
3. That the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and certain clerical employees of the defendant are indispensable parties.

The Court has considered the briefs filed in support of and in opposition to the motion and has heard oral argument and is now duly advised.

The Court concludes that the first two grounds of the motion to dismiss should be denied.

It Is Therefore Ordered that the motion to dismiss the complaint on the ground that the plaintiff is not a proper party to bring the action and to dismiss that portion of the action seeking an accounting be the same is hereby denied.

As to the third ground of the motion, the Court is of the opinion that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is an indispensable party to this proceeding.

The reasons for this conclusion are hereinafter set forth.

On June 25, 1963, the Adjustment Board entered its Award No. 9988.

The Award discloses that the plaintiff filed a claim with the Adjustment Board in which it contended that:

“(a) The Carrier has violated and continues to violate the agreement between the parties signatory thereto, when it requires or permits employees not covered by said agreement, to ‘handle’ train orders at West End Yard Office, Las Vegas, Nevada, and

“(b) That the Carrier has violated and continues to violate the agreement when it requires or permits other [fol. 78] than those covered by said agreement to operate printing and/or mechanical telegraph machines used in the transmission or reception of messages and reports of record, and/or to perforate tape or cards as a function in the transmission or reception of messages and reports of record at the West End Yard Office, Las Vegas, Nevada, and

“(c) That for such violations the Carrier shall compensate the senior idle employe or employees covered by the Telegraphers’ Agreement for the equivalent of a day’s pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers’ rate applicable to that particular location.”

The controversy before the Board so far as pertinent here involved the question of whether the operation of certain electro-mechanical devices in the yard office of the carrier at Las Vegas, Nevada should be operated by telegraphers. Upon the installation of these devices, the operation of certain of these electro-mechanical devices was as-

signed by the defendant to clerical employees who are members of the Brotherhood of Railway Clerks. Plaintiff in its claim submitted to the Adjustment Board contends that this work should have been assigned to telegraphers, and that the failure to do so was a violation of the collective bargaining agreement entered into between the plaintiff and the defendant. The plaintiff also sought compensation for the telegraphers who were idled by this alleged violation.

In accordance with Title 45, United States Code, Section 153 first (j), which provides:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them,"

the Board notified the president of the Brotherhood of Railway Clerks and the general chairman, Mr. Stanley B. Eoff, of the pendency of the controversy, the date of the hearing, and stated, "You will have the right to appear and file papers and any documents you desire in answer thereto, . . . " (See Exhibit A attached to defendant's reply memorandum.)

[fol. 79] The president of the Brotherhood of Railway Clerks took the position that this was solely a dispute between the defendant on the one hand and the plaintiff on the other, involving the interpretation of the agreement between them, and that the Clerks were not involved in the dispute as their rights are predicated upon a separate agreement between the Clerks' Brotherhood and the carrier. (See Exhibit B attached to the defendant's reply memorandum.)

Standing upon this position the Clerks did not participate in the proceedings leading to the award here in question.

The Board found "... that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office," and awarded compensation to the idle employees covered by the Telegraphers' Agreement.

The plaintiff brings this action to enforce the award. The Clerks' Brotherhood had not been made a party to the action and the defendant, by its motion to dismiss, raises the question of the indispensability of the Clerks as parties.

The basic question here involved is whether or not the Clerks have such an interest in this litigation as to be indispensable parties thereto.

The plaintiff's position may be best illustrated by that taken by the Clerks' Brotherhood in its letter to the Adjustment Board (Exhibit B attached to plaintiff's reply memorandum), which is that the present controversy is one involving solely the interpretation or application of an agreement between the plaintiff and defendant in which the Clerks have no interest.

The defendant on the other hand contends that inasmuch as the award in its ultimate effect gives to Telegraphers jobs now held by the Clerks, that the Clerks have such an interest in the litigation that they are indispensable parties.

Thus is posed the question of whether or not under the Railway Labor Act, two groups of employees competing for the same jobs under separate contracts with the same carrier shall be required to litigate their conflicting claims [fol. 80] in the same proceeding, or should they be permitted to proceed in separate proceedings to have their rights under their respective agreements adjudicated separately.

Prior to case law to the contrary, the Adjustment Board refused to bring competing groups before it in one proceeding, acting on the assumption that the Board had no authority under the Act to consider two agreements simultaneously, each in the light of the other. See *Missouri-Kansas-Texas R. Co. et al. v. Brotherhood of Railway and S.S. Clerks*, 188 F. 2d 302 at 305.

However, the case law is in substantial agreement that not only does the Board have such authority but a failure to exercise it by giving competing employees notice and an opportunity to be heard leaves the Board with no authority to enter an award. *Brotherhood of Railroad Trainmen v. Templeton* (Eighth Cir.), 181 F. 2d 527; *Hunter v. Atchison, Topeka and Santa Fe Railway* (Seventh Cir.), 171 F. 2d 594; *Missouri-Kansas-Texas Railway Co. v. Brotherhood of Railway and S. S. Clerks* (Seventh Cir.), 188 F. 2d 302; *Allain v. Tummon* (Seventh Cir.), 212 F. 2d 32; *Order of Railroad Telegraphers v. New Orleans, Texas and Mexico Railway Co.*, 229 F. 2d 59.

The reasoning for this conclusion is well illustrated in the decision by the Seventh Circuit in *Missouri-Kansas-Texas Railway Co. et al. v. Brotherhood of Railway & S. S. Clerks*, *supra*, where the Court stated at page 306:

"We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees.

"Obviously, it is desirable to settle controversies such as these involving so-called 'overlapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by § 6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and custom of the industry, or of the particular carrier."

[fol. 81] In the instant case the Board apparently recognized the effect of the case law above and made the Clerks parties to the proceeding. The question now presented to this Court is whether or not the Clerks are indispensable parties to this action to enforce the Board's award.

The Court concludes that they are.

Although 45 United States Code, Section 153 first (p) provides that in an action to enforce an award, the findings and order of the Board "shall be prima facie evidence of the facts therein stated," nevertheless such an action is a trial de novo. *Callan v. Great Northern Railway Co.*, 299 F. 2d 908; *Boos v. Railway Express Agency, Inc.*, 253 F. 2d 896; *Ward v. New Orleans Public Belt Railroad Commission*, 97 F. Supp. 1002; *Shipley v. Pittsburgh and L.E.R. Co.*, 83 F. Supp. 722; *Order of Sleeping Car Conductors v. Pullman Co.*, 47 F. Supp. 599.

It would appear that the reasoning requiring the Clerks to be parties to the proceeding before the Board is also applicable to the action to enforce the Board's award. If the Clerks are indispensable to a determination of the issues before the Board, then certainly they are indispensable to a determination of the same issues in a trial de novo before the court.

It was so held by the Eighth Circuit in *Order of Railroad Telegraphers v. New Orleans, Texas and Mexico Railway Co.*, 229 F. 2d 59 (supra). That action also involved a job dispute. In 1943 the Clerks obtained Award 2254 from the Adjustment Board finding that the carrier was violating its agreement with the Clerks in not assigning certain work at Anchorage, Louisiana to the Clerks. In 1950 the Adjustment Board, in a proceeding brought by the Telegraphers, awarded the same work to the Telegraphers by Award 4734.

The Telegraphers were not a party to the 1943 proceeding and the Clerks were not a party to the 1950 proceeding.

The Telegraphers brought suit in the United States District Court to enforce Award 4734. The District Court held the award void because the Clerks were not made parties to the proceeding before the Board and dismissed the action. [fol. 82] The Eighth Circuit affirmed the dismissal by the District Court but did not confine its reasons therefor to those given by the District Court.

The Eighth Circuit opinion states:

"The subsection (p) under which this action was brought provides 'Such suit in the District Court * * * shall proceed in all respects as other civil suits * * *' (with certain exceptions not here relevant). It is well settled that a Federal Court will not proceed to final decision of a controversy brought before it without the presence of all 'who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' *Shields v. Barrow*, 17 How. 129, 58 U.S. 129, loc. cit. 139, 15 L. Ed. 158; *Wesson v. Crain*, 8 Cir., 165 F. 2d 6, loc. cit. 9, and cases cited. Rule 19 of the Federal Rules of Civil Procedure, 28 U.S.C.A. has not modified the requirement as to indispensable parties. *Wesson v. Crain*, supra, and the undisputed facts in this case demonstrate that the Clerks are indispensable parties without whose presence justice cannot be done."

In its opinion the Eighth Circuit took cognizance of *Whitehouse v. Illinois Central Railroad Co.*, 349 U.S. 366. The Court in *Whitehouse* recognized and discussed the question of parties to such controversies, and some of the statements in *Whitehouse* appear to be contrary to the substantial agreement among the courts of appeal which hold that employees who compete for the jobs in controversy are indispensable parties to the proceedings before the Adjustment Board. But as the Eighth Circuit pointed out, the Supreme Court declined to adjudicate the questions which it discussed and found nothing in the *Whitehouse* case which controlled.

The Supreme Court refused to review the Eighth Circuit decision. (Certiorari denied 350 U.S. 997.)

This Court concurs in the Eighth Circuit's analysis of *Whitehouse* and believes the reasoning sound which led

that Court to its conclusion that the Clerks were indispensable parties to the action to enforce the award. [fol. 83] Therefore, the Court finds that the Clerks are parties indispensably necessary to a full and final adjudication of this action and that due to the failure to make their bargaining agent, namely, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a party to this action, the motion to dismiss on the ground of failure to join indispensable parties should be granted.

It Is Therefore Ordered that the motion to dismiss the complaint on the grounds that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is an indispensable party to this action be and the same is hereby granted and the complaint is dismissed.

It Is Further Ordered that the plaintiff shall have 30 days from this date within which to file an amended complaint making the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees a party defendant to this action and to cause process to be served upon said party.

It Is Further Ordered that if the plaintiff fails to file an amended complaint making the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees a party defendant and to cause process to be served upon said Brotherhood within the time allotted, this Court will, upon ex parte application of the defendant, order the entry of final judgment of dismissal of this action.

Dated at Denver, Colorado, this 15th day of July, 1964.

By The Court: Hatfield Chilson, Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AMENDMENT TO MEMORANDUM OPINION AND ORDER—
July 27, 1964

This Court on July 15, 1964 entered a memorandum opinion and order in the above entitled matter. In the [fol. 84] eighth paragraph on page two the Court stated that the Adjustment Board entered its award on June 25, 1963. This is an error in that the Adjustment Board entered its award on July 14, 1961.

It Is Therefore Ordered that the eighth paragraph on page two of said memorandum opinion and order is hereby amended to read as follows:

"On July 14, 1961, the Adjustment Board entered its Award No. 9988."

Except as amended hereby, the memorandum opinion and order entered on July 15, 1964 shall remain in full force and effect.

Dated at Denver, Colorado, this 27th day of July, 1964.

By The Court: Hatfield Chilson, Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE ORDER OF RAILROAD TELEGRAPHERS, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Civil No. 8107

FINAL JUDGMENT OF DISMISSAL—September 30, 1964

On July 15, 1964, this Court entered its Memorandum Opinion and Order in the above matter finding that certain clerical employees were parties indispensably necessary to a full and final adjudication of this action and that defendant's motion to dismiss should be granted since the Clerks' bargaining agent, namely, the Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, had not been made a party to this action. The Court ordered that the complaint be dismissed. It was further ordered, however, that plaintiff be given 30 days in which to file an amended complaint herein making the said Brotherhood a party defendant in this action and to cause process to be served on said Brotherhood but that if it failed to do so, this Court would, upon defendant's ex parte application, order the entry of final judgment of dismissal of this action. Pursuant to agreement of the parties and this Court's order dated August 13, 1964, the time within which plaintiff would have to file its amended complaint and to cause process to be served upon the said Brotherhood was enlarged for a period of 30 days to and including September 14, 1964.

[fol. 85] Plaintiff has failed to file an amended complaint herein making the said Brotherhood a party defendant to the above action and to cause process to be served upon said

brotherhood as directed in this Court's order of July 15, 1964, as amended by order dated August 13, 1964. The defendant has filed a motion requesting that the Court order the entering of final judgment of dismissal of this action and the Court finds that such motion should be granted and that final judgment of dismissal should be entered herein.

It Is, Therefore, Ordered that the complaint and this action be and hereby is dismissed with prejudice.

Dated at Denver, Colorado, this 30th day of September, 1964.

By The Court: Hatfield Chilson, Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

NOTICE OF APPEAL—Filed October 23, 1964

Notice Is Hereby Given pursuant to Rule 73(b) of the Rules of Civil Procedure that The Order of Railroad Telegraphers hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on September 30, 1964, and from the Memorandum Opinion and Order entered herein by the Court on July 15, 1964.

Dated this 23rd day of October, 1964.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys
for Plaintiff.

Of Counsel: Schoene and Kramer.

[An appeal bond was filed October 23, 1964]

[fol. 86]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL—
Filed October 23, 1964

Pursuant to the provisions of Rule 75(b) of the Rules of Civil Procedure, The Order of Railroad Telegraphers, plaintiff-appellant, files this, its statement of points to be relied upon on appeal:

1. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is neither a proper, necessary or indispensable party to this action.
2. The Court Committed error in granting defendant's motion to dismiss plaintiff's complaint.
3. The Court committed error in entering judgment of dismissal.

Lester P. Schoene, Philip Hornbein, Jr., Attorneys
for Plaintiff-Appellant.

Of counsel: Schoene and Kramer.

Clerk's Certificate (omitted in printing).

[fol. 87]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 7968—March 1965 Term

THE ORDER OF RAILROAD TELEGRAPHERS, Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO

Milton Kramer, of Schoene and Kramer, Washington, D. C. (Philip Hornbein, Jr., Denver, Colo., with him on the Brief), for Appellant.

James A. Wilcox, Omaha, Neb. (E. G. Knowles, Clayton D. Knowles, Denver, Colo., and Harry Lustgarten, Jr., Omaha, Neb., with him on the Brief), for Appellee.

Before MURRAH, Chief Judge, LEWIS and SETH, Circuit Judges.

OPINION—October 8, 1965

SETH, Circuit Judge.

[fol. 88] The opinion in this case filed by the Clerk on July 22, 1965, is hereby withdrawn, and the following substituted in its place:

This is an appeal from an order of the United States District Court for the District of Colorado, dismissing the appellant's petition for enforcement of an award of the National Railroad Adjustment Board for failure to join an indispensable party.

[File endorsement omitted]

The case before us is but another episode in the long-standing jurisdictional struggle between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Clerks"), and the Order of Railroad Telegraphers ("Telegraphers"). For a detailed history of the origins of this dispute, see *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 61 F.Supp. 869 (E.D.Mo.) *vacated and remanded* 156 F.2d 1 (8th Cir.), *cert. den.* 329 U.S. 758.

The facts in the controversy before the Board insofar as they are pertinent here are as follows: The dispute grew out of the action of the Union Pacific in 1952 in installing electronic equipment in its various yard offices, including the one at Las Vegas, Nevada, which brought about radical [fol. 89] changes in the carrier's car record procedures. In the operation of these machines, a communication function previously performed by the Telegraphers is apparently automatically performed by employees represented by the Clerks. Since the basic function of the machines is to handle clerical work, the job of punching the program cards and operating the machines was assigned to clerical employees. As a result of such action the Telegraphers filed a complaint with the Adjustment Board under 45 U.S.C.A. §§ 151-188.

The Telegraphers' claim before the Board was that the carrier had violated its collective bargaining agreement with the Telegraphers by assigning the work referred to to the Clerks. They prayed that for such violations the carrier be ordered to compensate those employees represented by the Telegraphers to whom the work should have been assigned. In compliance with 45 U.S.C.A. § 153, First (j), the Board served notice upon the Clerks as "employees . . . involved in any disputes submitted to them [the Board]." In reply, the President of the Clerks sent a letter to the Board stating the Clerks' position that the dispute was solely between the carrier and the Telegraphers, involving interpretation of the agreement between the two, and that [fol. 90] the Clerks would not therefore participate in the proceedings before the Board. However, the letter added

that if as a result of the proceedings before the Board, work belonging to the Clerks was taken away from them by the carrier, the Clerks would take appropriate action in separate proceedings before the Board.

The proceedings before the Board resulted in an award in favor of the Telegraphers against the carrier, and the carrier was ordered to compensate idle employees covered by its agreement with the Telegraphers. Upon the carrier's failure to comply with the award, the Telegraphers filed this action for enforcement in the District Court for the District of Colorado under 45 U.S.C.A. § 153, First (p). The carrier filed a motion to dismiss the enforcement action on the grounds the Telegraphers had failed to join an indispensable party, namely the Clerks. The court granted the motion and ordered that the Telegraphers should have thirty days from the date of the order to file an amended complaint. Upon failure of the Telegraphers to do so, the court entered final judgment of dismissal with prejudice. It is from this judgment that the Telegraphers appeal. The memorandum opinion and order granting the motion to dismiss with leave to file an amended complaint may be found at 231 F.Supp. 33.

[fol. 91] The jurisdiction of the National Railroad Adjustment Board is as set out in the Railway Labor Act, 45 U.S.C.A. § 153, First (i). This subsection provides that the appropriate division of the Adjustment Board shall have authority over disputes between the employees and a carrier arising from interpretation or application of collective bargaining agreements and grievances arising out of such contracts. Thus the Board is empowered to hear disputes which arise from grievances, from the interpretation or from the application of contracts. See *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 327 U.S. 661.

In the case at bar we are concerned with an interunion dispute. Two important cases of this character which have been considered by the Supreme Court are *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, and *Order of Railway*

Conductors v. Pitney, 326 U.S. 561. There have also been a number of similar disputes which are considered in the opinions of the United States Court of Appeals in several Circuits. These cases all basically involve a dispute between two labor unions as to which group is entitled to particular jobs under their individual contracts with the railroad. These positions have come into dispute for the most part, as did the positions in the case at bar, by reason of the above decisions that the authority of the Adjustment Board has been established to entertain disputes of this character, although were the matter one of first impression we would have some doubt.

In the case at bar, under the existing decisions, it was necessary that the Adjustment Board give notice to the Clerks, and this was done as mentioned above. The National Railway Labor Act provides that notice be given to a party "involved" [45 U.S.C.A. § 153, First (j)]. The Act however also provides [45 U.S.C.A. § 153, First (m)] that the award shall be binding on "both" parties, and in subsections (o) and (p) reference is made only to the "carrier" and to the "petitioner." Thus the Act in some respects contemplates that there be but two parties, and the work "involved" in subsection (j) could be construed to refer to only one of these two parties. 9 Stan. L.Rev. 820. However, it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks Union. See, *e.g.*, *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d 59 (8th Cir.), *cert. den.* 350 U.S. 997; *Allain v. Tummon*, 212 F.2d 32 (7th Cir.); *Hunter v. Atchison, T. & S.F. Ry.*, 171 F.2d 594 (7th Cir.), *cert. den.* 337 U.S. 916. Some courts have grounded this requirement on due process, while [fol. 93] others have not placed it on a constitutional basis but have nevertheless made it a requirement. The court, in *Order of Railway Telegraphers v. New Orleans, T. & M. Ry.*, *supra*, held in part that an Adjustment Board's award was void for failure to give notice to the Clerks, who were there "involved" as they are here. The Supreme Court in

Whitehouse v. Illinois Central R.R., 349 U.S. 366, considered a similar dispute between the Clerks and Telegraphers. Before the Board acted the carrier brought a separate action in the court to enjoin the Board from acting until notice was given the Clerks, the non-petitioning union. The Supreme Court as dicta mentioned the "substantial agreement among Courts of Appeal which have considered the question in holding that notice is required . . .", but indicated it was not a constitutional question. This issue is fully covered in the trial court's opinion in the case at bar at 231 F.Supp. 33.

It is however apparent that the requirement that notice be given to the competing union in disputes of this character must be derived from the scope and nature of the issues before the Board. When the Board undertakes to enter the field of jurisdictional disputes as it has done, it is apparent that the issues considered in each petition must necessarily concern at least one other union in addition to [fol. 94] the one filing a petition. This "concern" is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose.

The record in this case shows that the Board considered the contract of the petitioning union as if the contract with the non-petitioning union purportedly covering the same job does not exist at all. The jurisdictional dispute was thus decided in a piecemeal manner, the Board ostensibly acting under its jurisdiction to interpret a contract between a carrier and a union. Other contracts for what appeared to be the same jobs were excluded by its rules of evidence.

The Supreme Court in a case concerned with the matter of notice and of primary jurisdiction of the Board said:

"We have seen that in order to reach a final decision . . . the court first had to interpret the terms of O.R.C.'s [fol. 95] collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document', in terms of the ordinary meaning of the words and their position . . . *For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all the parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (citations omitted and emphasis added).

This statement is most important in the case at bar because the Supreme Court in the cited case, and in *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, has recognized the authority of the Board to consider these jurisdictional-contract disputes and should be taken as an indication as to how it should be done. If we are to consider that the Board has authority over this dispute, it must exercise it over the whole dispute at one time, not half at one time with one set of participants, and half at another. The notice requirement whatever its basis; and the Supreme Court's statements in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, that the contracts of one must be read in the light of the other, lead to the conclusion that the fundamental issues before the Board included those per-

taining to the Clerks and to their contract. Their claim to the same jobs requires that the Telegraphers' contract and position be examined in the light thereof before the dispute can be realistically settled. The Clerks for all practical purposes thereby become parties to the administrative proceedings.

The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. A complete hearing would include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a [fol. 97] complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make an initial determination, if petitioned to act, before a court can act on a complete proceeding should it be requested to do so. *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239; *Order of Railway Conductors v. Pitney*, 326 U.S. 561.

The statutory provision that the findings and order of the Board are prima facie evidence of the facts therein stated [45 U.S.C.A. § 153 First (p)] when given its fullest effect still left the trial court and us with facts as to only part of a dispute, and certainly not enough upon which to base a decision.

The District Court dismissed appellant's petition for failure to join an indispensable party—the Clerks. Had these parties been joined and appeared presumably the matters relating to their position and contract could have been presented to the court thereby filling the same void we find to exist. Our difference with the District Court is only in that the Board should under the doctrine of primary jurisdiction have the first opportunity to consider the entire controversy, including the Clerks' contract.

The disposition of the case by the trial court is

Affirmed.

[fol. 98]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUDGMENT—October 8, 1965

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

It is now here ordered by the court that the opinion in this cause filed on July 22, 1965, be and the same is hereby withdrawn and that the judgment of this court entered on July 22, 1965, be and the same is hereby vacated.

It is further ordered that the opinion in this cause filed October 8, 1965, be substituted for the opinion of July 22, 1965, and that the judgment of the lower court be and the same is hereby affirmed.

[fol. 99] Clerk's Certificate (omitted in printing).

[fol. 100]

SUPREME COURT OF THE UNITED STATES

No. 652, October Term, 1965

TRANSPORTATION-COMMUNICATION EMPLOYEES
UNION, Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—February 21, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~012~~ 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

MILTON KRAMER
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October 7, 1965

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PAGE

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
I. The National Railroad Adjustment Board Did Not Err in Determining the Claim of the Petitioner Without Determining the Rights of Employees Represented by the Brotherhood of Railway Clerks	5
II. This Case Presents an Important Question of Statutory Construction Which Ought To Be Decided by This Court, and Has Been Decided by the Court Below in a Manner Contrary to the Way This Court Has Indicated that It Should Be Decided	16
Conclusion	17
Appendix A	1a
Appendix B	8a
Appendix C	8a

CASES CITED

Allain v. Tummon, 212 F. 2d 32 (7th Cir. 1954)	16
Brotherhood of R.R. Trainmen v. Templeton, 181 F. 2d 527 (8th Cir. 1950)	16
Carey v. Westinghouse, 375 U.S. 261 (1964)	14
Elgin, J. & E. R.R. v. Burley, 325 U.S. 711 (1945)	16
International Brotherhood of Firemen and Oilers v. In- ternational Association of Machinists, 338 F. 2d 176 (5th Cir. 1964)	15

	Page
National Labor Relations Board v. Radio and Television Broadcast Engineers, 364 U.S. 573 (1961) ..	10
Nord v. Griffin, 86 F. 2d 481 (7th Cir. 1936)	16
Order of Railroad Conductors v. Pitney, 326 U.S. 561 (1946)	10
Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 229 F. 2d 59 (8th Cir. 1956), cert. den. 350 U.S. 997	16
Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950)	10
Whitehouse v. Illinois Central R.R., 349 U.S. 366 (1955)	8, 12, 13, 16, 17

STATUTES

Railway Labor Act, 45 U.S.C. 151-164, 48 Stat. 1185:

Section 3, First (i)	9, 8a
Section 3, First (j)	8, 9a

National Labor Relations Act, 29 U.S.C. 151-168, 61 Stat. 136:

Section 10(k)	9, 14, 9a
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No.

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,¹
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT**

The Transportation-Communication Employees Union prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on July 22, 1965.

¹ On September 1, 1965, the Court of Appeals granted Petitioner's motion to amend the name of the appellant in the caption of the case from "The Order of Railroad Telegraphers" to "Transportation-Communication Employees Union" to conform with the Union's change in name.

OPINIONS BELOW

The opinion of the District Court (R. 9-16)² is reported at 231 F. Supp. 33. The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported. It is unofficially reported at 59 LRRM 2993.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1965, and is appended hereto as Appendix B, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the National Railroad Adjustment Board may determine a dispute arising from a claim that a railroad has assigned work in violation of a collective bargaining agreement without a determination of the rights of other employees represented by another union to whom the work was assigned, where the other union was given notice of the proceeding before the Adjustment Board and declined to participate, and where the other union has not filed a claim with the Adjustment Board?

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C. §§ 151-164) and the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. §§ 151-168) are set forth in Appendix C, *infra*.

² "R" denotes the "Transcript of Record" as filed in the Court of Appeals. One certified and nine uncertified copies have been filed with the Clerk of this Court for use in the consideration of this petition for a writ of certiorari.

STATEMENT

This action was brought by the Transportation-Communication Employees Union (formerly "The Order of Railroad Telegraphers" and herein referred to as "TCU") against the Union Pacific Railroad Company (herein referred to as the "Railroad") to enforce an Award and Order of the National Railroad Adjustment Board, Third Division (herein referred to as the "Adjustment Board"). (R. 1-4)

The TCU, as the duly authorized and designated representative under the Railway Labor Act of the craft or class of employees commonly known as "Telegraphers" (R. 2), filed a claim with the Adjustment Board that the Railroad had violated the collective bargaining agreement between the parties by not assigning the operation of certain machines in the Railroad's yard office in Las Vegas, Nevada, to employees represented by TCU. The Railroad had assigned the work to employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (herein referred to as the "BRC"). (R. 2-3)

The Adjustment Board notified the BRC of the pendency of the proceedings, the date set for the hearing, and that the BRC would be permitted to appear and participate. (R. 7-8) The BRC's reply to the Adjustment Board was that the controversy before the Adjustment Board concerned a dispute between the Railroad and the TCU over an interpretation of the agreement between those two parties, that the BRC was not involved in that dispute, and that it would not participate in the proceedings before the Adjustment Board. (R. 8-9)

The Adjustment Board, thereafter, considered the merits of TCU's claim and on July 14, 1961, issued Award No. 9988 and an accompanying Order sustaining the TCU's claim and directing the Railroad to make the Award effective. (R. 4) The Railroad refused to comply with the Award and Order of the Adjustment Board, whereupon this action was brought.

On September 13, 1963, the Railroad filed a motion to dismiss TCU's complaint (R. 5) setting forth three grounds, the first two of which were denied by the District Court. (R. 10) The substance of the third ground for dismissal, which was sustained by the District Court, was that TCU had failed to name an indispensable party, namely BRC, to the enforcement action. The District Court dismissed the complaint with leave for TCU to file, within 30 days of the Order, an amended complaint making BRC a party to the action. (R. 16) TCU did not make BRC a party and on September 30, 1964, the District Court granted Railroad's motion and entered a final judgment of dismissal dismissing the complaint. (R. 17-18)

On appeal, the Court of Appeals did not pass on the sole question presented before it, namely, whether BRC was an indispensable party to the enforcement action, but instead vacated and set aside the Order of the Adjustment Board, and remanded the case to the District Court with instructions to remand it to the Adjustment Board for further proceedings. (Appendix B, *infra*.)

The Court held that the dispute before the Adjustment Board involved a jurisdictional dispute between TCU and BRC involving a question of which group of employees was entitled to perform certain work, that BRC "for all practical purposes" became "parties"

to the Adjustment Board proceeding, and that the Adjustment Board was required to exercise its jurisdiction "over the whole dispute at one time." The Court concluded:

"Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order."

REASONS FOR GRANTING THE WRIT

I. The National Railroad Adjustment Board Did Not Err in Determining the Claim of TCU Without Determining the Rights of Employees Represented by BRC

The Court of Appeals held that the Adjustment Board could not determine the dispute arising from a claim that the Railroad had assigned work in violation of a collective bargaining agreement between it and TCU without a determination of the rights of employees represented by BRC to whom the work was assigned, even though BRC was given notice of the proceedings before the Adjustment Board and declined to participate, and even though neither BRC nor the Railroad had filed a claim with the Adjustment Board concerning the meaning of their agreement. We know of no other case in which a court has ruled on this issue. To the extent that this Court has considered this issue, however, the conclusions drawn by this Court are contrary to the decision of the Court of Appeals.

The Court of Appeals viewed this case as involving a jurisdictional dispute between two groups of em-

employees, one represented by TCU and the other represented by BRC, as to which group is entitled to perform certain work. The Court was of the opinion that although the claim before the Adjustment Board pertained only to an alleged violation of an agreement between TCU and the Railroad, with TCU seeking damages for the alleged breach of such agreement, the nature of the claim resulted in BRC "for all practical purposes" becoming a party to the administrative proceedings and required the Adjustment Board to exercise authority "over the whole dispute at one time" and to adjudicate the rights of the employees represented by BRC as well as those represented by TCU,—a ruling not urged by any of the parties, either before the Adjustment Board or in the courts below.

The Court of Appeals concluded that the prior proceeding before the Adjustment Board was incomplete and directed the District Court to remand the case to the Adjustment Board with directions for further proceedings "which [are] necessary to a complete disposition of the dispute as to all concerned parties." The Court added that "When a Board hearing is so held, and if proper notice be given to the Clerks [BRC], they would be bound by the Board's findings and order."

Thus, the Court of Appeals held that since TCU's claim involved a dispute over an assignment of work the Adjustment Board had jurisdiction to determine and was required to determine, not only whether the Railroad had breached its agreement with TCU but was constrained to determine the rights of employees represented by BRC.

It is TCU's position, however, that the jurisdiction of the Adjustment Board does not extend to a deter-

mination of the rights of employees under an agreement which is not the subject of a claim before the Adjustment Board. The jurisdiction of the Adjustment Board in a dispute such as is involved here is limited to determining claims that one of the parties to a collective bargaining agreement has breached the agreement and, if such breach is found, directing an appropriate remedy. This is precisely what the Adjustment Board did in the present case. The Adjustment Board sustained the claim of TCU that under its agreement with the Railroad, the Railroad should have assigned employees represented by TCU to perform the work in question and awarded the employees damages for breach of the agreement.

Thus, while the Adjustment Board might have found it relevant and helpful to consider other evidence such as usage, practice, and custom in the railroad industry, and the agreement between the Railroad and BRC, such evidence would have relevance only for the purpose of shedding light on the interpretation to be given to the agreement between the Railroad and TCU which formed the basis of the claim. The existence of such evidence, including the agreement between BRC and the Railroad would not, contrary to the holding of the Court of Appeals, make BRC "in effect" a party to this action nor would it affect any contractual rights that employees represented by BRC may have. Until such time as a claim under the BRC agreement is filed with the Adjustment Board, the Adjustment Board would not have jurisdiction to determine rights under that agreement.

It is important to note that this case does not present the issue of whether BRC is "involved" in the dispute within the meaning of § 3 First (j) of the Railway

Labor Act, 45 U.S.C. § 153(j) (Appendix C, *infra*), and therefore whether notice of the proceedings before the Adjustment Board must be given to BRC. Although this Court has never ruled even on this issue,³ such issue is not presented herein because notice to the BRC of the proceedings before the Adjustment Board was in fact given.

Furthermore, this case likewise does not involve a question of whether the Adjustment Board could consider evidence relating to any agreements between the Railroad and BRC as well as evidence concerning practice, custom, or usage which would be relevant to the issue before the Adjustment Board. The Railroad has not contended it was not given an opportunity to present any evidence it chose in the proceedings before the Adjustment Board nor is there any indication that the Adjustment Board refused to consider any evidence.⁴

The issue here is whether, upon consideration of all relevant evidence, and notice given to BRC, TCU is entitled to a determination by the Adjustment Board of its claim that the Railroad breached its agreement by not assigning certain work to employees represented by TCU. The Adjustment Board found that it had jurisdiction to determine the dispute, and did so. The Railroad did not question the jurisdiction of the Adjustment Board to make the determination, BRC

³ See *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, 370-373 (1955).

⁴ There is nothing in the record to support the statement by the Court below (Appendix A, *infra*, p. 6a) that:

"Other contracts for what appeared to be the same jobs were excluded by its [Adjustment Board's] rules of evidence."

raised no objection, and the District Court found no fault with the Adjustment Board's determination. It was not until the decision of the Court of Appeals that the determination of the Adjustment Board was brought into question and a holding made that the Adjustment Board did not exercise its jurisdiction properly,—a holding not urged by any of the parties.

Neither the provisions of the Railway Labor Act nor cases construing the Act support the Court of Appeals' holding.

The jurisdiction of the Adjustment Board is set forth in § 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (Appendix C, *infra*), and is confined to:

“... disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions”

There is no provision in the Act authorizing a union to file a claim with the Adjustment Board that it is entitled to the assignment of work except in the form of a claim that a railroad breached an agreement by not assigning the work in question to employees it represents, nor would the Adjustment Board have jurisdiction to determine such dispute except in such form.⁵

⁵ The situation is completely different under the Labor Management Relations Act (LMRA). Under § 10 (k) of that Act, 29 U.S.C. § 160 (k) (Appendix C, *infra*), the National Labor Relations Board (NLRB) specifically is charged to “hear and determine” jurisdictional disputes. This Court has held that such mandate requires the NLRB to make a decision “that one or the other [group of employees] is entitled to do the work in dispute.” *National Labor Relations Board v. Radio and Television Broadcast*

The Court of Appeals considered its determination required by precedent but, as will be shown below, the cases relied upon by the Court were not concerned with nor even mentioned the issue presented in this case. We know of no cases where a Court has ruled on such issue, and in the only case, also to be discussed below, in which this Court considered the issue herein, the Court took a position diametrically opposed to that taken by the Court of Appeals.

The *Pitney*⁶ and *Slocum*⁷ cases relied upon by the Court of Appeals are not determinative of the issue herein. The issue in each of those cases was whether a court had primary jurisdiction to entertain a suit alleging a breach of collective bargaining agreements between a railroad and a union involving an assignment of work. In *Pitney*, action was brought in the federal courts, and in *Slocum*, suit was filed in the

Engineers (Columbia Broadcasting System), 364 U.S. 573 (1961). This Court stated (at 579):

"This language also indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks." (Emphasis added.)

There is no provision in the Railway Labor Act which even remotely is akin to § 10 (k) of the LMRA. As shown above, under the Railway Labor Act the jurisdiction of the Adjustment Board is limited solely to a determination of whether the collective bargaining agreement has been violated, while under § 10 (k) of the LMRA, the collective bargaining agreement merely is to be considered a factor in determining which of two groups of employees is entitled to an assignment of work.

⁶ *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946).

⁷ *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950).

state courts. In each case, this Court held that exclusive primary jurisdiction to resolve disputes involving interpretations of agreements was in the Adjustment Board and not in the courts.

The Court of Appeals, however, relies on language by this Court in *Pitney* and *Slocum* that in determining the proper interpretation to be given to the collective bargaining agreements involved in those cases, the Adjustment Board must consider such evidence as usage, practice, and custom in the industry, and also any other agreements the railroad entered into with other unions. The Court below construed this language as an indication that the Adjustment Board was directed to consider both unions as parties to its proceedings and that the Adjustment Board must determine the rights under all agreements in one proceeding.

Even a cursory reading of these cases, however, shows that there is no basis for such construction. All this Court said in *Pitney* and *Slocum* was that the Adjustment Board was to consider all evidence including other agreements the railroad had with another union. The issue here, however, is not whether the Adjustment Board can consider the agreement between the Railroad and BRC; the issue is whether the existence of such other agreement (here, the BRC agreement) enlarges the jurisdiction of the Adjustment Board so as to require it to adjudicate not only the scope of the TCU agreement but also to adjudicate, in a manner binding on BRC, the meaning of the BRC agreement. The Court of Appeals decided that the existence of the agreement between the Railroad and BRC made BRC a party to the proceedings initiated by the claim of TCU and that the jurisdiction of the Adjustment Board was extended and required to be exercised to

adjudicate the meaning of the BRC agreement. TCU's contention is that the Adjustment Board's jurisdiction is not broadened by the existence of such agreements but that the Adjustment Board should consider other agreements merely as an aid in interpreting the agreement forming the basis of the claim. This Court in neither *Pitney* nor *Slocum* decided this issue.⁸

The only case in which this Court discussed the issue presented herein is *Whitehouse v. Illinois Central R. R.*, 349 U.S. 366 (1955).

The *Whitehouse* case also was commenced when TCU filed a claim with the Adjustment Board that the railroad had violated agreements between the parties by not assigning the work in question to employees it represented. The railroad there also had assigned the work to employees represented by BRC. Unlike the present case, however, BRC was not given notice of the proceedings before the Adjustment Board. Before the Adjustment Board could issue a determination, the railroad sought an injunction to restrain the Adjustment Board from deciding the dispute until notice was given.

One of the railroad's contentions was that notice to BRC was necessary so that the entire dispute could be settled at one time, thus securing the railroad against

⁸ This fact was emphasized in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), wherein the Court stated (at 371-72):

"Assuming the Act permits the Board to consider the claim of one union in light of competing agreements between Railroad and other unions, see *Order of Railway Conductors v. Pitney*, 326 U.S. 561, does it permit 'final and binding' awards to be rendered interpreting both contracts and resolving the independent claims of both unions in a single proceeding?"

The Court did not answer the question.

the possibility of awards to both unions since an award to TCU would not prevent BRC from prosecuting a similar claim successfully.

This Court rejected this contention, stating (*Whitehouse, supra*, at 372):

"One thing is unquestioned. Were notice given to Clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding. Clerks here have not attempted to intervene. They have merely stated an intention to bring a separate proceeding in case they are affected by an award in this case. Indeed Railroad refers to an understanding between Clerks and Telegraphers whereby the one will not intervene in proceedings initiated before the Board by the other, but will press its claims independently. . . . We would thus have to consider whether those potential injuries alleged to flow solely from failure of Clerks to participate may be the basis for judicial intervention where there is neither a legal right of the complaining party to be free from such injuries nor any assurance that judicial action will afford relief."

The Court of Appeals holding in this case that, "When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order," clearly is inconsistent with this Court's statement in *Whitehouse* that even if notice were given to the Clerks it could be "indifferent to it" and could "refuse to participate" in the proceeding. Certainly this Court did not mean that the Clerks had the privilege to surrender its rights by default.

Furthermore, the holding of this Court in *Whitehouse* that the Adjustment Board could proceed with

its determination of TCU's claim with no requirement that the Adjustment Board simultaneously make a binding determination of the meaning of the BRC agreement, contrary to the decision of the Court below, shows that the existence of other agreements between the railroad and another union does not extend the jurisdiction of the Adjustment Board to require it to determine the scope of the other agreement and the rights of employees covered by that agreement.

The same result would be reached under common law in the absence of legislation.

In *Carey v. Westinghouse*, 375 U.S. 261 (1964), two unions subject to the Labor Management Relations Act (LMRA) were engaged in a dispute concerning the assignment of work. One of the unions claiming the work filed a grievance under its contract with the employer contending that its agreement with the employer covered the disputed work and requested that the grievance proceed to arbitration as required by the agreement.

The employer refused to proceed to arbitration on the ground that the grievance involved a jurisdictional dispute between two unions which should be resolved by the National Labor Relations Board pursuant to § 10(k) of the LMRA. This Court held that the employer was required to arbitrate the grievance. The Court stated (*Carey, supra*, at 265-66):

"To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. . . . The case in its present posture is analogous to *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, where a railroad

and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it.' *Id.*, at 373."

The present case differs from *Carey* only in that arbitration has taken place in the present case in the form of the proceeding before the Adjustment Board, while it was only prospective in *Carey*. Since the Court, in *Carey*, directed the parties to arbitrate the dispute, it may be assumed that the award of the arbitrator would be valid and subject to enforcement even though the other union was not a party to the arbitration. In *International Brotherhood of Firemen and Oilers v. International Association of Machinists*, 338 F.2d 176 (5th Cir. 1964), the Court enforced the award of an arbitrator under the factual circumstances the same as were present in *Carey*. Similarly in the present case, the award of the Adjustment Board is valid, at least with respect to any procedural requirement.

Moreover, similarly here, as in *Carey*, this Court's holding that arbitration must proceed despite the absence of the other union, shows that the existence of other agreements between the railroad and other unions does not require a determination, in this case, of the scope of those other agreements nor a determination of the rights of employees under such agreements.

II. This Case Presents an Important Question of Statutory Construction Which Ought To Be Decided by This Court, and Has Been Decided by the Court Below in a Manner Contrary to the Way This Court Has Indicated That It Should Be Decided

As discussed, *supra*, in point I, the issue in this case involves an interpretation of the provisions of the Railway Labor Act which created the National Railroad Adjustment Board for the resolution of so-called "minor" disputes.⁹ At issue is the jurisdiction of the Adjustment Board and the procedure to be followed by it in determining disputes arising from claims that a railroad has assigned work in violation of collective bargaining agreements.

On numerous occasions in the past, the Adjustment Board and the courts have been called upon to determine controversies arising from a railroad's assignment of work where there existed potentially "overlapping contracts" between the railroad and two unions.¹⁰ In *Whitehouse v. Illinois Central R. R.*, *supra*, the issue involved was whether the Adjustment

⁹ A "minor" dispute has been defined by this Court as one which:

"... contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, J. & E. R.R. v. Burley*, 325 U.S. 711, 723 (1945).

¹⁰ See for example, *The Order of R.R. Telegraphers v. New Orleans T. & M. Ry.*, 229 F. 2d 59 (8th Cir. 1956), *cert. den.* 350 U.S. 997; *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955); *Allain v. Tummon*, 212 F. 2d 32 (7th Cir. 1954); *Brotherhood of R.R. Trainmen v. Templeton*, 181 F. 2d 527 (8th Cir. 1950); *Order of R.R. Conductors v. Pitney*, 326 U.S. 561 (1946); *Nord v. Griffin*, 86 F. 2d 481 (7th Cir. 1936).

Board was required to give notice to persons not formal parties to a submission to the Adjustment Board. This Court found the issue presented a "perplexing problem" and stated (349 U.S. at 370):

"We granted certiorari because serious questions concerning the administration of the Railway Labor Act are in issue."

The issue in the present case presents even more "serious questions" since here notice was given to the BRC (not a party to the submission) yet the Court below nonetheless invalidated the Adjustment Board's determination on the ground that it was not sufficient to give notice to BRC but that the Adjustment Board also was required to determine the scope of BRC's agreement. As we showed in point I, *supra*, the Court of Appeals' decision is contrary to that indicated by this Court in *Whitehouse*.

It is thus vitally important to the continued orderly administration of the Railway Labor Act that the jurisdiction of the Adjustment Board in this area be clearly defined.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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October 7, 1965

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7968 — MARCH 1965 TERM

THE ORDER OF RAILROAD TELEGRAPHERS, *Appellant*,

v.

UNION PACIFIC RAILROAD COMPANY, *Appellee*.

Appeal From the United States District Court for the
District of Colorado

Milton Kramer, of Schoene and Kramer, Washington,
D. C. (Philip Hornbein, Jr., Denver, Colo., with him on
the Brief), for Appellant.

James A. Wilcox, Omaha, Neb. (E. G. Knowles, Clayton
D. Knowles, Denver, Colo., and Harry Lustgarten, Jr.,
Omaha, Neb., with him on the Brief), for Appellee.

Before MURRAH, Chief Judge, LEWIS and SETH, Circuit
Judges.

SETH, Circuit Judge.

This is an appeal from an order of the United States
District Court for the District of Colorado, dismissing
the appellant's petition for enforcement of an award of
the National Railroad Adjustment Board for failure to
join an indispensable party.

The case before us is but another episode in the long-standing jurisdictional struggle between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Clerks"), and the Order of Railroad Telegraphers ("Telegraphers"). For a detailed history of the origins of this dispute, see *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 61 F. Supp. 869 (E. D. Mo.), *vacated and remanded* 156 F.2d 1 (8th Cir.), *cert. den.* 329 U.S. 758.

The facts in the controversy before the Board insofar as they are pertinent here are as follows: The dispute grew out of the action of the Union Pacific in 1952 in installing electronic equipment in its various yard offices, including the one at Las Vegas, Nevada, which brought about radical changes in the carrier's car record procedures. In the operation of these machines, a communication function previously performed by the Telegraphers is apparently automatically performed by employees represented by the Clerks. Since the basic function of the machines is to handle clerical work, the job of punching the program cards and operating the machines was assigned to clerical employees. As a result of such action the Telegraphers filed a complaint with the Adjustment Board under 45 U.S.C.A. §§ 151-188.

The Telegraphers' claim before the Board was that the carrier had violated its collective bargaining agreement with the Telegraphers by assigning the work referred to to the Clerks. They prayed that for such violations the carrier be ordered to compensate those employees represented by the Telegraphers to whom the work should have been assigned. In compliance with 45 U.S.C.A. § 153, First (j), the Board served notice upon the Clerks as "employees ... involved in any disputes submitted to them [the Board]." In reply, the President of the Clerks sent a letter to the Board stating the Clerks' position that the dispute was solely between the carrier and the Telegraphers, involving interpretation of the agreement between

the two, and that the Clerks would not therefore participate in the proceedings before the Board. However, the letter added that if as a result of the proceedings before the Board, work belonging to the Clerks was taken away from them by the carrier, the Clerks would take appropriate action in separate proceedings before the Board.

The proceedings before the Board resulted in an award in favor of the Telegraphers against the carrier, and the carrier was ordered to compensate idle employees covered by its agreement with the Telegraphers. Upon the carrier's failure to comply with the award, the Telegraphers filed this action for enforcement in the District Court for the District of Colorado under 45 U.S.C.A. § 153, First (p). The carrier filed a motion to dismiss the enforcement action on the grounds the Telegraphers had failed to join an indispensable party, namely the Clerks. The court granted the motion and ordered that the Telegraphers should have thirty days from the date of the order to file an amended complaint. Upon failure of the Telegraphers to do so the court entered final judgment of dismissal with prejudice. It is from this judgment that the Telegraphers appeal. The memorandum opinion and order granting the motion to dismiss with leave to file an amended complaint may be found at 231 F. Supp. 33.

The jurisdiction of the National Railroad Adjustment Board is as set out in the Railway Labor Act, 45 U.S.C.A. § 153, First (i). This subsection provides that the appropriate division of the Adjustment Board shall have authority over disputes between the employees and a carrier arising from interpretation or application of collective bargaining agreements and grievances arising out of such contracts. Thus the Board is empowered to hear disputes which arise from grievances, from the interpretation or from the application of contracts. See *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 327 U.S. 661.

In the case at bar we are concerned with an interunion dispute. Two important cases of this character which have

been considered by the Supreme Court are *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, and *Order of Railway Conductors v. Pitney*, 326 U.S. 561. There have also been a number of similar disputes which are considered in the opinions of the United States Court of Appeals in several Circuits. These cases all basically involve a dispute between two labor unions as to which group is entitled to particular jobs under their individual contracts with the railroad. These positions have come into dispute for the most part, as did the positions in the case at bar, by reason of certain technological changes. We must consider by reason of the above decisions that the authority of the Adjustment Board has been established to entertain disputes of this character.

In the case at bar, under the existing decisions, it was necessary that the Adjustment Board give notice to the Clerks, and this was done as mentioned above. The National Railway Labor Act provides that notice be given to a party "involved" [45 U.S.C.A. § 153, First (j)]. The Act however also provides [45 U.S.C.A. § 153, First (m)] that the award shall be binding on "both" parties, and in subsections (o) and (p) reference is made only to the "carrier" and to the "petitioner." Thus the Act in some respects contemplates that there be but two parties, and the word "involved" in subsection (j) could be construed to refer to only one of these two parties. 9 Stan. L.Rev. 820. However it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks Union. See, *e.g.*, *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d 59 (8th Cir.), *cert. den.* 350 U.S. 997; *Allain v. Tummon*, 212 F.2d 32 (7th Cir.); *Hunter v. Atchison, T. & S. F. Ry.*, 171 F.2d 594 (7th Cir.), *cert. den.* 337 U.S. 916. Some courts have grounded this requirement on due process, while others have not placed it on a constitutional basis but have nevertheless made it a requirement. The court, in *Order of Railway Telegraphers v. New Orleans, T. & M. Ry.*, *supra*, held in part that an Adjustment Board's award was void

for failure to give notice to the Clerks, who were there "involved" as they are here. The Supreme Court in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, considered a similar dispute between the Clerks and Telegraphers. Before the Board acted the carrier brought a separate action in the court to enjoin the Board from acting until notice was given the Clerks, the non-petitioning union. The Supreme Court as dicta mentioned the "substantial agreement among Courts of Appeal which have considered the question in holding that notice is required ...", but indicated it was not a constitutional question. This issue is fully covered in the trial court's opinion in the case at bar at 231 F. Supp. 33.

It is however apparent that the requirement that notice be given to the competing union in disputes of this character must be derived from the scope and nature of the issues before the Board. When the Board undertakes to enter the field of jurisdictional disputes as it has done, it is apparent that the issues considered in each petition must necessarily concern at least one other union in addition to the one filing a petition. This "concern" is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose.

The record in this case shows that the Board considered the contract of the petitioning union as if the contract with the non-petitioning union purportedly covering the same job does not exist at all. The jurisdictional dispute was thus decided in a piecemeal manner, the Board osten-

sibly acting under its jurisdiction to interpret a contract between a carrier and a union. Other contracts for what appeared to be the same jobs were excluded by its rules of evidence. The Supreme Court in a case concerned with the matter of notice and of primary jurisdiction of the Board said:

"We have seen that in order to reach a final decision . . . the court first had to interpret the terms of O.R.C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document,' in terms of the ordinary meaning of the words and their position . . . *For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all the parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (citations omitted and emphasis added).

This statement is most important in the case at bar because the Supreme Court in the cited case, and in *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, has recognized the authority of the Board to consider these jurisdictional-contract disputes and should be taken as an indication as to how it should be done. If we are to consider that the Board has authority over this dispute, it must exercise it over the whole dispute at one time, not half at one time with one set of participants, and half at another. The notice requirement whatever its basis, and the Supreme

Court's statements in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, that the contracts of one must be read in the light of the other, lead to the conclusion that the fundamental issues before the Board included those pertaining to the Clerks and to their contract. Their claim to the same jobs requires that the Telegraphers' contract and position be examined in the light thereof before the dispute can be realistically settled. The Clerks for all practical purposes thereby become parties to the administrative proceedings.

The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make this initial determination before a court can act on a complete proceeding, should it be requested to do so. *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239; *Order of Railway Conductors v. Pitney*, 326 U.S. 561. When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order.

The order of the National Railroad Adjustment Board is vacated and set aside. The case is remanded to the United States District Court for the District of Colorado with directions to further remand the case to the Board in accordance herewith.

APPENDIX B**Judgment**

Eighth Day, July Term, Thursday, July 22nd, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges,

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the National Railroad Adjustment Board is vacated and set aside. The case is remanded to the United States District Court for the District of Colorado with directions to further remand the case to the Board in accordance with the opinion of the court. It is further ordered that The Order of Railroad Telegraphers, appellant, have and recover of and from Union Pacific Railroad Company, appellee, its costs herein and have execution therefor.

APPENDIX C

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 1185), 45 U.S.C., ch. 8; U.S.C.A., Title 45 secs. 151-164.

Section 153, First (i):

“The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operat-

ing officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 153, First (j):

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Labor Management Relations Act (Pub. No. 101, 80th Cong., appd. June 23, 1947, 49 Stat. 136), 45 U.S.C., ch. 7; U.S.C.A., Tit. 29, secs. 151-168.

Section 160 (k):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the disputes"

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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1965**

No. ~~652~~ 28

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
*Petitioner,***

v.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETI-
TION AND SUPPLEMENTAL PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT**

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PAGE

TABLE OF CONTENTS

	Page
Motion for Leave to File Supplemental Petition	1
Opinions Below	4
Jurisdiction	4
Question Presented	4
Statutes Involved	5
Statement	5
Reasons for Granting the Writ	9
I. The Holding of the Court Below That the National Railroad Adjustment Board Erred in Determining the Claim of the Petitioner Without Determining the Rights of Employees Represented by the Brotherhood of Railway Clerks Is Contrary to the Views Expressed by This Court	9
II. This Case Presents an Important Question of Statutory Construction Which Ought To Be Decided by This Court, and Has Been Decided by the Court Below in a Manner Contrary to the Way This Court Has Indicated That It Should Be Decided	20
Conclusion	21
Appendix A	1a
Appendix B	8a
Appendix C	16a
Appendix D	16a
Appendix E	17a

CASES CITED

Allain v. Tummon, 212 F. 2d 32 (7th Cir. 1954)	20
Brotherhood of R.R. Trainmen v. Templeton, 181 F. 2d 527 (8th Cir. 1950)	20
Carey v. Westinghouse, 375 U.S. 261 (1964)	18

	Page
Elgin, J. & E. R.R. v. Burley, 325 U.S. 711 (1945)	20
International Brotherhood of Firemen and Oilers v. International Association of Machinists, 338 F. 2d 176 (5th Cir. 1964)	19
National Labor Relations Board v. Radio and Televi- sion Broadcast Engineers, 364 U.S. 573 (1961) ...	13
Nord v. Griffin, 86 F. 2d 481 (7th Cir. 1936)	20
Order of Railroad Conductors v. Pitney, 326 U.S. 561 (1946)	14, 20
Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 229 F. 2d 59 (8th Cir. 1956), cert. den. 350 U.S. 997	20
Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950)	14
Whitehouse v. Illinois Central R.R., 349 U.S. 366 (1955)	12, 16, 20

STATUTES

Railway Labor Act, 45 U.S.C. 151-164, 48 Stat. 1185:	
Section 3, First (i)	13, 17a
Section 3, First (j)	11, 17a
Labor Management Relations Act, 29 U.S.C. 151-168, 61 Stat. 136:	
Section 10(k)	13, 18, 17a

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 652

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETI-
TION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH
CIRCUIT**

Now comes petitioner herein, and, pursuant to Rules 24(4) and 35 of the Rules of this Court, hereby respectfully moves for leave to file the attached supplemental petition for certiorari in this case.

On October 7, 1965, the petitioner filed with this Court a petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment of that Court entered on July 22,

1965 that an Order of the National Railroad Adjustment Board was unenforceable.

On October 8, 1965, the Court of Appeals withdrew its opinion and judgment entered on July 22, 1965, and entered a new opinion and judgment. Although the initial judgment of the Court of Appeals reversed the decision of the lower court and the subsequent judgment affirmed the decision of the lower court, in each instance, the Court held that an Order of the National Railroad Adjustment Board, in favor of petitioner, was unenforceable. The instant petition seeks a review of that holding. The basis of the petitioner's original petition for certiorari remains the same, and there is no necessity to alter the Question Presented as stated in the original petition.

Wherefore, petitioner prays that it be granted leave to file the attached supplemental petition for certiorari in this case.

Respectfully submitted,

MILTON KRAMER

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 652

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,¹
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

**SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

The Transportation-Communication Employees Union prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on October 8, 1965.

¹ On September 1, 1965, the Court of Appeals granted petitioner's motion to amend the name of the appellant in the caption of the case from "The Order of Railroad Telegraphers" to "Transportation-Communication Employees Union" to conform with the Union's change in name.

OPINIONS BELOW

The opinion of the District Court (R. 9-16)² is reported at 231 F. Supp. 33. The first opinion of the Court of Appeals (Appendix A, *infra*) is reported at 349 F. 2d 408. The second opinion of the Court of Appeals (Appendix B, *infra*) has not yet been officially reported. It is unofficially reported at 60 LRRM 2244.

JURISDICTION

The original judgment of the Court of Appeals was entered on July 22, 1965, and is appended hereto as Appendix C, *infra*. On October 8, 1965, the Court below vacated that judgment and in its place substituted a new judgment. (Appendix D, *infra*.) Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the National Railroad Adjustment Board may determine a dispute arising from a claim that a railroad has assigned work in violation of a collective bargaining agreement without a determination of the rights of other employees represented by another union to whom the work was assigned, where the other union was given notice of the proceeding before the Adjustment Board and declined to participate, and where the other union has not filed a claim with the Adjustment Board?

² "R" denotes the "Transcript of Record" as filed in the Court of Appeals. One certified and nine uncertified copies have been filed with the Clerk of this Court for use in the consideration of this petition for a writ of certiorari.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C. §§ 151-164) and the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. §§ 151-168) are set forth in Appendix E, *infra*.

STATEMENT

This action was brought by the Transportation-Communication Employees Union (formerly "The Order of Railroad Telegraphers" and herein referred to as "TCU") against the Union Pacific Railroad Company (herein referred to as the "Railroad") to enforce an Award and Order of the National Railroad Adjustment Board, Third Division (herein referred to as the "Adjustment Board"). (R. 1-4)

The TCU, as the duly authorized and designated representative under the Railway Labor Act of the craft or class of employees commonly known as "Telegraphers" (R. 2), filed a claim with the Adjustment Board that the Railroad had violated the collective bargaining agreement between the parties by not assigning the operation of certain machines in the Railroad's yard office in Las Vegas, Nevada, to employees represented by TCU. The Railroad had assigned the work to employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (herein referred to as the "BRC"). (R. 2-3)

The Adjustment Board notified BRC of the pendency of the proceedings, the date set for the hearing, and that BRC would be permitted to appear and participate. (R. 7-8) The BRC's reply to the Adjustment Board was that the controversy before the Adjustment Board concerned a dispute between the Rail-

road and TCU over an interpretation of the agreement between those two parties, that BRC was not involved in that dispute, and that it would not participate in the proceedings before the Adjustment Board. (R. 8-9)

The Adjustment Board thereafter considered the merits of TCU's claim and on July 14, 1961, issued Award No. 9988 and an accompanying Order sustaining TCU's claim and directing the Railroad to make the Award effective. (R. 4) The Railroad refused to comply with the Award and Order of the Adjustment Board, whereupon this action was brought.

On September 13, 1963, the Railroad filed a motion to dismiss TCU's complaint (R. 5) setting forth three grounds, the first two of which were denied by the District Court. (R. 10) The substance of the third ground for dismissal, which was sustained by the District Court, was that TCU had failed to name an indispensable party, namely BRC, to the enforcement action. The District Court dismissed the complaint with leave for TCU to file, within 30 days of the Order, an amended complaint making BRC a party to the action. (R. 16) TCU did not make BRC a party and on September 30, 1964, the District Court granted Railroad's motion and entered a final judgment of dismissal dismissing the complaint. (R. 17-18)

On July 22, 1965, the Court of Appeals issued an opinion and judgment in which the Court did not pass on the sole question presented before it, namely, whether BRC was an indispensable party to the enforcement action, but instead vacated and set aside the Order of the Adjustment Board, and remanded the case to the District Court with instructions to remand

it to the Adjustment Board for further proceedings. (Appendices A and C, *infra.*)

The Court held that the dispute before the Adjustment Board involved a jurisdictional dispute between TCU and BRC involving a question of which group of employees was entitled to perform certain work, that BRC "for all practical purposes" became "parties" to the Adjustment Board proceeding, and that the Adjustment Board was required to exercise its jurisdiction "over the whole dispute at one time."

On or about September 16, 1965, the Railroad filed with the Court of Appeals a motion requesting leave to file a petition for rehearing out of time, and a petition for rehearing, concerning the part of the Court's judgment which directed that the case be remanded to the Adjustment Board for further proceedings.

On October 7, 1965, TCU filed with this Court a petition for certiorari to review the part of the Court's judgment vacating and setting aside the Order of the Adjustment Board.

The following day, on October 8, 1965, without acting on the motion of the Railroad, the Court of Appeals withdrew its opinion and judgment entered on July 22, 1965, and in their place entered a new opinion and judgment. (Appendices B and D, *infra.*) The latter judgment affirmed the disposition of the case by the District Court, namely, a dismissal of the complaint. There was no direction, as there had been in the first judgment, that the case be remanded to the Adjustment Board for further proceedings.

Although the first judgment of the Court of Appeals reversed the District Court and the second judgment affirmed the lower Court, the holding of the Court of

Appeals was the same to the extent of declaring the Order of the Adjustment Board void and unenforceable. The Court's rationale also remained the same. The two opinions are virtually identical except for the final two paragraphs. In its initial opinion, in keeping with its decision that the Order of the Adjustment Board was unenforceable and that the case be remanded to the Adjustment Board, the Court of Appeals concluded (Appendix A, *infra*, p. 7a):

"Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order."

In its second opinion, consistent with its decision that the Order of the Adjustment Board was unenforceable and that the case not be remanded to the Adjustment Board, the Court concluded (Appendix B, *infra*, pp. 14a-15a):

"The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. A complete hearing would include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make an initial determination, if petitioned to act, before a court can act on a complete proceeding should it be requested to do so. *Slocum v. Delaware, L. & W. R.R.*, 339

U.S. 239; Order of Railway Conductors v. Pitney, 326 U.S. 561.

"The District Court dismissed the appellant's petition for failure to join an indispensable party—the Clerks. Had these parties been joined and appeared presumably the matters relating to their position and contract could have been presented to the court thereby filling the same void we find to exist. Our difference with the District Court is only in that the Board should under the doctrine of primary jurisdiction have the first opportunity to consider the entire controversy, including the Clerks' contract."

REASONS FOR GRANTING THE WRIT

I. The Holding of the Court Below That the National Railroad Adjustment Board Erred in Determining the Claim of TCU Without Determining the Rights of Employees Represented by BRC Is Contrary to the Views Expressed by This Court

The Court of Appeals held that the Adjustment Board could not determine the dispute arising from a claim that the Railroad had assigned work in violation of a collective bargaining agreement between it and TCU without a determination of the rights of employees represented by BRC to whom the work was assigned, even though BRC was given notice of the proceedings before the Adjustment Board and declined to participate, and even though neither BRC nor the Railroad had filed a claim with the Adjustment Board concerning the meaning of their agreement. We know of no other case in which a court has ruled on this issue. To the extent that this Court has considered this issue, however, the conclusions drawn by this Court are contrary to the decision of the Court of Appeals.

The Court of Appeals viewed this case as involving a jurisdictional dispute between two groups of employees, one represented by TCU and the other represented by BRC, as to which group is entitled to perform certain work. The Court was of the opinion that although the claim before the Adjustment Board pertained only to an alleged violation of an agreement between TCU and the Railroad, with TCU seeking damages for the alleged breach of such agreement, the nature of the claim resulted in BRC "for all practical purposes" becoming a party to the administrative proceedings and required the Adjustment Board to exercise authority "over the whole dispute at one time" and to adjudicate the rights of the employees represented by BRC as well as those represented by TCU,—a ruling not urged by any of the parties, either before the Adjustment Board or in the courts below. The Court of Appeals concluded that the prior proceeding before the Adjustment Board was incomplete because it did not dispose of "all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties."

Thus, the Court of Appeals held that since TCU's claim involved a dispute over an assignment of work, the Adjustment Board had jurisdiction to determine and was required to determine, not only whether the Railroad had breached its agreement with TCU but was constrained to determine the rights of employees represented by BRC.

However, the jurisdiction of the Adjustment Board does not extend to a determination of the rights of employees under an agreement which is not the subject of a claim before the Adjustment Board.

The jurisdiction of the Adjustment Board in a dispute such as is involved here is limited to determining claims that one of the parties to a collective bargaining agreement has breached the agreement and, if such breach is found, directing an appropriate remedy. This is precisely what the Adjustment Board did in the present case. The Adjustment Board sustained the claim of TCU that under its agreement with the Railroad, the Railroad should have assigned employees represented by TCU to perform the work in question and awarded the employees damages for breach of the agreement.

Thus, while the Adjustment Board might have found it relevant and helpful to consider other evidence such as usage, practice, and custom in the railroad industry, and the agreement between the Railroad and BRC, such evidence would have relevance only for the purpose of shedding light on the interpretation to be given to the agreement between the Railroad and TCU which formed the basis of the claim. The existence of such evidence, including the agreement between BRC and the Railroad would not, contrary to the holding of the Court of Appeals, make BRC "in effect" a party to the action nor would it affect any contractual rights that employees represented by BRC may have. Until such time as a claim under the BRC agreement is filed with the Adjustment Board, the Adjustment Board would not have jurisdiction to determine rights under that agreement.

It is important to note that this case does not present the issue of whether BRC is "involved" in the dispute within the meaning of § 3 First (j) of the Railway Labor Act, 45 USC § 153(j) (Appendix E, *infra*), and therefore whether notice of the proceedings be-

fore the Adjustment Board must be given to BRC. Although this Court has never ruled even on this issue,³ such issue is not presented herein because notice to the BRC of the proceedings before the Adjustment Board was in fact given.

Furthermore, this case likewise does not involve a question of whether the Adjustment Board could consider evidence relating to any agreements between the Railroad and BRC as well as evidence concerning practice, custom, or usage which would be relevant to the issue before the Adjustment Board. The Railroad has not contended it was not given an opportunity to present any evidence it chose in the proceedings before the Adjustment Board nor is there any indication that the Adjustment Board refused to consider any evidence.⁴

The issue here is whether, upon consideration of all relevant evidence, and notice given to BRC, TCU is entitled to a determination by the Adjustment Board of its claim that the Railroad breached its agreement by not assigning certain work to employees represented by TCU. The Adjustment Board found that it had jurisdiction to determine the dispute, and did so. The Railroad did not question the jurisdiction of the Adjustment Board to make the determination, BRC raised no objection, and the District Court found no fault with the Adjustment Board's determination. It was not until the decision of the Court of Appeals

³ See *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, 370-373 (1955).

⁴ There is nothing in the record to support the statement by the Court below (Appendix B, *infra*, p. 13a) that:

"Other contracts for what appeared to be the same jobs were excluded by its [Adjustment Board's] rules of evidence."

that the determination of the Adjustment Board was brought into question and a holding made that the Adjustment Board did not exercise its jurisdiction properly,—a holding not urged by any of the parties.

Neither the provisions of the Railway Labor Act nor cases construing the Act support the Court of Appeals' holding.

The jurisdiction of the Adjustment Board is set forth in § 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (Appendix E, *infra*), and is confined to:

“... disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions”

There is no provision in the Act authorizing a union to file a claim with the Adjustment Board that it is entitled to the assignment of work except in the form of a claim that a railroad breached an agreement by not assigning the work in question to employees it represents, nor would the Adjustment Board have jurisdiction to determine such dispute except in such form.⁵

⁵ The situation is completely different under the Labor Management Relations Act (LMRA). Under § 10 (k) of that Act, 29 U.S.C. § 160(k) (Appendix E, *infra*), the National Labor Relations Board (NLRB) specifically is charged to “hear and determine” jurisdictional disputes. This Court has held that such mandate requires the NLRB to make a decision “that one or the other [group of employees] is entitled to do the work in dispute.” *National Labor Relations Board v. Radio and Television Broadcast Engineers (Columbia Broadcasting System)*, 364 U.S. 573 (1961). This Court stated (at 579):

“This language also indicates a congressional purpose to have the Board do something more than merely look at prior Board

The Court of Appeals considered its determination required by precedent but, as will be shown below, the cases relied upon by the Court were not concerned with nor even mentioned the issue presented in this case. We know of no cases where a Court has ruled on such issue, and in the only case, also to be discussed below, in which this Court considered the issue herein, the Court took a position diametrically opposed to that taken by the Court of Appeals.

The *Pitney*⁶ and *Slocum*⁷ cases relied upon by the Court of Appeals are not determinative of the issue herein. The issue in each of those cases was whether a court had primary jurisdiction to entertain a suit alleging a breach of collective bargaining agreements between a railroad and a union involving an assignment of work. In *Pitney*, action was brought in the federal courts, and in *Slocum*, suit was filed in the state courts. In each case, this Court held that exclusive primary jurisdiction to resolve disputes involving interpretations of agreements was in the Adjustment Board and not in the courts.

orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks." (Emphasis added.)

There is no provision in the Railway Labor Act which even remotely is akin to § 10(k) of the LMRA. As shown above, under the Railway Labor Act the jurisdiction of the Adjustment Board is limited solely to a determination of whether the collective bargaining agreement has been violated, while under § 10(k) of the LMRA, the collective bargaining agreement merely is to be considered a factor in determining which of two groups of employees is entitled to an assignment of work.

⁶ *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946).

⁷ *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950).

The Court of Appeals, however, relies on language by this Court in *Pitney* and *Slocum* that in determining the proper interpretation to be given to the collective bargaining agreements involved in those cases, the Adjustment Board must consider such evidence as usage, practice, and custom in the industry, and also any other agreements the railroad entered into with other unions. The Court below construed this language as an indication that the Adjustment Board was directed to consider both unions as parties to its proceedings and that the Adjustment Board must determine the rights under all agreements in one proceeding.

Even a cursory reading of these cases, however, shows that there is no basis for such construction. All this Court said in *Pitney* and *Slocum* was that the Adjustment Board was to consider all evidence including other agreements the railroad had with other unions. The issue here, however, is not whether the Adjustment Board can consider the agreement between the Railroad and BRC; the issue is whether the existence of such other agreement (here, the BRC agreement) enlarges the jurisdiction of the Adjustment Board so as to require it to adjudicate not only the scope of the TCU agreement but also to adjudicate, in a manner binding on BRC, the meaning of the BRC agreement. The Court of Appeals decided that the existence of the agreement between the Railroad and BRC made BRC a party to the proceedings initiated by the claim of TCU and that the jurisdiction of the Adjustment Board was extended and required to be exercised to adjudicate the meaning of the BRC agreement, and that the failure of the Adjustment Board to render such an adjudication rendered invalid its adjudication of the claim filed by TCU. TCU's contention is that the Adjustment Board's jurisdiction is not broad-

ened by the existence of such agreements but that the Adjustment Board should consider other agreements merely as an aid in interpreting the agreement forming the basis of the claim. This Court in neither *Pitney* nor *Slocum* decided this issue.⁸

The only case in which this Court discussed the issue presented herein is *Whitehouse v. Illinois Central R. R.*, 349 U.S. 366 (1955).

The *Whitehouse* case also was commenced when TCU filed a claim with the Adjustment Board that the railroad had violated agreements between the parties by not assigning the work in question to employees it represented. The railroad there also had assigned the work to employees represented by BRC. Unlike the present case, however, BRC was not given notice of the proceedings before the Adjustment Board. Before the Adjustment Board could issue a determination, the railroad sought an injunction to restrain the Adjustment Board from deciding the dispute until notice was given.

One of the railroad's contentions was that notice to BRC was necessary so that the entire dispute could be

⁸ This fact was emphasized in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), where the Court stated (at 371-72):

"Assuming the Act permits the Board to consider the claim of one union in light of competing agreements between Railroad and other unions, see *Order of Railway Conductors v. Pitney*, 326 U.S. 561, does it permit 'final and binding' awards to be rendered interpreting both contracts and resolving the independent claims of both unions in a single proceeding?"

The court did not answer the question in *Whitehouse*. That question must be answered here, for this Court below held that not only does the Act permit the Adjustment Board to make final and binding interpretations of both contracts, but that the Act requires the Adjustment Board to do so.

settled at one time, thus securing the railroad against the possibility of awards to both unions since an award to TCU would not prevent BRC from prosecuting a similar claim successfully.

This Court rejected this contention, stating (*Whitehouse, supra*, at 372):

“One thing is unquestioned. Were notice given to Clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding. Clerks here have not attempted to intervene. They have merely stated an intention to bring a separate proceeding in case they are affected by an award in this case. Indeed Railroad refers to an understanding between Clerks and Telegraphers whereby the one will not intervene in proceedings initiated before the Board by the other, but will press its claims independently. . . . We would thus have to consider whether those potential injuries alleged to flow solely from failure of Clerks to participate may be the basis for judicial intervention where there is neither a legal right of the complaining party to be free from such injuries nor any assurance that judicial action will afford relief.”

The Court of Appeals' holding in this case that the existence of an agreement between the Railroad and BRC “in effect” made BRC a party to the proceedings before the Adjustment Board, and that the Adjustment Board was required to make a “complete disposition of the dispute as to all concerned parties,” clearly is inconsistent with this Court's statement in *Whitehouse* that even if notice were given to the Clerks it could be “indifferent to it” and could “refuse to participate” in the proceeding. Certainly this Court did not mean that the Clerks had the privilege to surrender

its rights by default, or that BRC had the power, by its refusal to participate, to render invalid any award in favor of TCU.

Furthermore, the holding of this Court in *Whitehouse* that the Adjustment Board could proceed with its determination of TCU's claim with no requirement that the Adjustment Board simultaneously make a binding determination of the meaning of the BRC agreement, contrary to the decision of the Court below, shows that the existence of other agreements between the railroad and another union does not extend the jurisdiction of the Adjustment Board to require it to determine the scope of the other agreement and the rights of employees covered by that agreement.

The same result would be reached under common law in the absence of legislation.

In *Carey v. Westinghouse*, 375 U.S. 261 (1964), two unions subject to the Labor Management Relations Act (LMRA) were engaged in a dispute concerning the assignment of work. One of the unions claiming the work filed a grievance under its contract with the employer contending that its agreement with the employer covered the disputed work and requested that the grievance proceed to arbitration as required by the agreement.

The employer refused to proceed to arbitration on the ground that the grievance involved a jurisdictional dispute between two unions which should be resolved by the National Labor Relations Board pursuant to § 10(k) of the LMRA. This Court held that the employer was required to arbitrate the grievance. The Court stated (*Carey, supra*, at 265-66):

“To be sure, only one of the two unions involved in the controversy has moved the state courts to

compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. . . . The case in its present posture is analogous to *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, where a railroad and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it.' *Id.*, at 373."

The present case differs from *Carey* only in that arbitration has taken place in the present case in the form of the proceeding before the Adjustment Board, while it was only prospective in *Carey*. Since the Court, in *Carey*, directed the parties to arbitrate the dispute, it may be assumed that the award of the arbitrator would be valid and subject to enforcement even though the other union was not a party to the arbitration. In *International Brotherhood of Firemen and Oilers v. International Association of Machinists*, 338 F. 2d 176 (5th Cir. 1964), the Court enforced the award of an arbitrator under the factual circumstances the same as were present in *Carey*. Similarly in the present case, the award of the Adjustment Board is valid, at least with respect to any procedural requirement.

Moreover, this Court's holding in *Carey* that arbitration must proceed despite the absence of the other union, shows that the existence of other agreements between the railroad and other unions does not require a determination, in this case, of the scope of those other agreements nor a determination of the rights of employees under such agreements.

II. This Case Presents an Important Question of Statutory Construction Which Ought To Be Decided by This Court, and Has Been Decided by the Court Below in a Manner Contrary to the Way This Court Has Indicated That It Should Be Decided

As discussed, *supra*, in point I, the issue in this case involves an interpretation of the provisions of the Railway Labor Act which created the National Railroad Adjustment Board for the resolution of so-called "minor" disputes.⁹ At issue is the jurisdiction of the Adjustment Board and the procedure to be followed by it in determining disputes arising from claims that a railroad has assigned work in violation of collective bargaining agreements.

On numerous occasions in the past, the Adjustment Board and the courts have been called upon to determine controversies arising from a railroad's assignment of work where there existed potentially "overlapping contracts" between the railroad and two unions.¹⁰ In *Whitehouse v. Illinois Central R. R.*, *supra*, the issue involved was whether the Adjustment

⁹ A "minor" dispute has been defined by this Court as one which:

"... contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, J. & E. R.R. v. Burley*, 325 U.S. 711, 723 (1945).

¹⁰ See for example, *The Order of R.R. Telegraphers v. New Orleans T. & M. Ry.*, 229 F. 2d 59 (8th Cir. 1956), *cert. den.* 350 U.S. 997; *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955); *Allain v. Tummon*, 212 F. 2d 32 (7th Cir. 1954); *Brotherhood of R.R. Trainmen v. Templeton*, 181 F. 2d 527 (8th Cir. 1950); *Order of R.R. Conductors v. Pitney*, 326 U.S. 561 (1946); *Nord v. Griffin*, 86 F. 2d 481 (7th Cir. 1936).

Board was required to give notice to persons not formal parties to a submission to the Adjustment Board. This Court found the issue presented a "perplexing problem" and stated (349 U.S. at 370):

"We granted certiorari because serious questions concerning the administration of the Railway Labor Act are in issue."

The issue in the present case presents even more "serious questions" since here notice was given to the BRC (not a party to the submission) yet the Court below nonetheless invalidated the Adjustment Board's determination on the ground that it was not sufficient to give notice to BRC but that the Adjustment Board also was required to determine the scope of BRC's agreement. As we showed in point I, *supra*, the Court of Appeals' decision is contrary to that indicated by this Court in *Whitehouse*.

It is thus vitally important to the continued orderly administration of the Railway Labor Act that the jurisdiction of the Adjustment Board in this area be clarified.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

MILTON KRAMER

LESTER P. SCHOENE

MARTIN W. FINGERHUT

SCHOENE AND KRAMER Attorneys for Petitioner

1625 K Street, N. W.

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December 13, 1965

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APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

No. 7968—MARCH 1965 TERM

THE ORDER OF RAILROAD TELEGRAPHERS, *Appellant*,

v.

UNION PACIFIC RAILROAD COMPANY, *Appellee*.

**Appeal From the United States District Court for the
District of Colorado**

Milton Kramer, of Schoene and Kramer, Washington,
D. C. (Philip Hornbein, Jr., Denver, Colo., with him on
the Brief), for Appellant.

James A. Wilcox, Omaha, Neb. (E. G. Knowles, Clayton
D. Knowles, Denver, Colo., and Harry Lustgarten, Jr.,
Omaha, Neb., with him on the Brief), for Appellee.

Before MURRAH, Chief Judge, LEWIS and SETH, Circuit
Judges.

SETH, Circuit Judge.

This is an appeal from an order of the United States
District Court for the District of Colorado, dismissing
the appellant's petition for enforcement of an award of
the National Railroad Adjustment Board for failure to
join an indispensable party.

The case before us is but another episode in the long-standing jurisdictional struggle between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Clerks"), and the Order of Railroad Telegraphers ("Telegraphers"). For a detailed history of the origins of this dispute, see *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 61 F. Supp. 869 (E. D. Mo.), *vacated and remanded* 156 F.2d 1 (8th Cir.), *cert. den.* 329 U.S. 758.

The facts in the controversy before the Board insofar as they are pertinent here are as follows: The dispute grew out of the action of the Union Pacific in 1952 in installing electronic equipment in its various yard offices, including the one at Las Vegas, Nevada, which brought about radical changes in the carrier's car record procedures. In the operation of these machines, a communication function previously performed by the Telegraphers is apparently automatically performed by employees represented by the Clerks. Since the basic function of the machines is to handle clerical work, the job of punching the program cards and operating the machines was assigned to clerical employees. As a result of such action the Telegraphers filed a complaint with the Adjustment Board under 45 U.S.C.A. §§ 151-188.

The Telegraphers' claim before the Board was that the carrier had violated its collective bargaining agreement with the Telegraphers by assigning the work referred to to the Clerks. They prayed that for such violations the carrier be ordered to compensate those employees represented by the Telegraphers to whom the work should have been assigned. In compliance with 45 U.S.C.A. § 153, First (j), the Board served notice upon the Clerks as "employees . . . involved in any disputes submitted to them [the Board]." In reply, the President of the Clerks sent a letter to the Board stating the Clerks' position that the dispute was solely between the carrier and the Telegra-

phers, involving interpretation of the agreement between the two, and that the Clerks would not therefore participate in the proceedings before the Board. However, the letter added that if as a result of the proceedings before the Board, work belonging to the Clerks was taken away from them by the carrier, the Clerks would take appropriate action in separate proceedings before the Board.

The proceedings before the Board resulted in an award in favor of the Telegraphers against the carrier, and the carrier was ordered to compensate idle employees covered by its agreement with the Telegraphers. Upon the carrier's failure to comply with the award, the Telegraphers filed this action for enforcement in the District Court for the District of Colorado under 45 U.S.C.A. § 153, First (p). The carrier filed a motion to dismiss the enforcement action on the grounds the Telegraphers had failed to join an indispensable party, namely the Clerks. The court granted the motion and ordered that the Telegraphers should have thirty days from the date of the order to file an amended complaint. Upon failure of the Telegraphers to do so the court entered final judgment of dismissal with prejudice. It is from this judgment that the Telegraphers appeal. The memorandum opinion and order granting the motion to dismiss with leave to file an amended complaint may be found at 231 F. Supp. 33.

The jurisdiction of the National Railroad Adjustment Board is as set out in the Railway Labor Act, 45 U.S.C.A. § 153, First (i). This subsection provides that the appropriate division of the Adjustment Board shall have authority over disputes between the employees and a carrier arising from interpretation or application of collective bargaining agreements and grievances arising out of such contracts. Thus the Board is empowered to hear disputes which arise from grievances, from the interpretation or from the application of contracts. See *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 327 U.S. 661.

In the case at bar we are concerned with an interunion dispute. Two important cases of this character which have been considered by the Supreme Court are *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, and *Order of Railway Conductors v. Pitney*, 326 U.S. 561. There have also been a number of similar disputes which are considered in the opinions of the United States Court of Appeals in several Circuits. These cases all basically involve a dispute between two labor unions as to which group is entitled to particular jobs under their individual contracts with the railroad. These positions have come into dispute for the most part, as did the positions in the case at bar, by reason of certain technological changes. We must consider by reason of the above decisions that the authority of the Adjustment Board has been established to entertain disputes of this character.

In the case at bar, under the existing decisions, it was necessary that the Adjustment Board give notice to the Clerks, and this was done as mentioned above. The National Railway Labor Act provides that notice be given to a party "involved" [45 U.S.C.A. § 153, First (j)]. The Act however also provides [45 U.S.C.A. § 153, First (m)] that the award shall be binding on "both" parties, and in subsections (o) and (p) reference is made only to the "carrier" and to the "petitioner." Thus the Act in some respects contemplates that there be but two parties, and the word "involved" in subsection (j) could be construed to refer to only one of these two parties. 9 Stan. L.Rev. 820. However it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks Union. See, *e.g.*, *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d 59 (8th Cir.), *cert. den.* 350 U.S. 997; *Allain v. Tummon*, 212 F.2d 32 (7th Cir.); *Hunter v. Atchison, T. & S. F. Ry.*, 171 F.2d 594 (7th Cir.), *cert. den.* 337 U.S. 916. Some courts have grounded this requirement on due process, while others have not placed it on a constitutional basis but have nevertheless made it a requirement. The court, in *Order of*

Railway Telegraphers v. New Orleans, T. & M. Ry., supra, held in part that an Adjustment Board's award was void for failure to give notice to the Clerks, who were there "involved" as they are here. The Supreme Court in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, considered a similar dispute between the Clerks and Telegraphers. Before the Board acted the carrier brought a separate action in the court to enjoin the Board from acting until notice was given the Clerks, the non-petitioning union. The Supreme Court as dicta mentioned the "substantial agreement among Courts of Appeal which have considered the question in holding that notice is required . . .", but indicated it was not a constitutional question. This issue is fully covered in the trial court's opinion in the case at bar at 231 F. Supp. 33.

It is however apparent that the requirement that notice be given to the competing union in disputes of this character must be derived from the scope and nature of the issues before the Board. When the Board undertakes to enter the field of jurisdictional disputes as it has done, it is apparent that the issues considered in each petition must necessarily concern at least one other union in addition to the one filing a petition. This "concern" is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose.

The record in this case shows that the Board considered the contract of the petitioning union as if the contract

with the non-petitioning union purportedly covering the same job does not exist at all. The jurisdictional dispute was thus decided in a piecemeal manner, the Board ostensibly acting under its jurisdiction to interpret a contract between a carrier and a union. Other contracts for what appeared to be the same jobs were excluded by its rules of evidence. The Supreme Court in a case concerned with the matter of notice and of primary jurisdiction of the Board said:

"We have seen that in order to reach a final decision . . . the court first had to interpret the terms of O.R.C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document,' in terms of the ordinary meaning of the words and their position . . . *For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all the parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (citations omitted and emphasis added).

This statement is most important in the case at bar because the Supreme Court in the cited case, and in *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, has recognized the authority of the Board to consider these jurisdictional-contract disputes and should be taken as an indication as to how it should be done. If we are to consider that the Board has authority over this dispute, it must exercise it

over the whole dispute at one time, not half at one time with one set of participants, and half at another. The notice requirement whatever its basis, and the Supreme Court's statements in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, that the contracts of one must be read in the light of the other, lead to the conclusion that the fundamental issues before the Board included those pertaining to the Clerks and to their contract. Their claim to the same jobs requires that the Telegraphers' contract and position be examined in the light thereof before the dispute can be realistically settled. The Clerks for all practical purposes thereby become parties to the administrative proceedings.

The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make this initial determination before a court can act on a complete proceeding, should it be requested to do so. *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239; *Order of Railway Conductors v. Pitney*, 326 U.S. 561. When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order.

The order of the National Railroad Adjustment Board is vacated and set aside. The case is remanded to the United States District Court for the District of Colorado with directions to further remand the case to the Board in accordance herewith.

APPENDIX B

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

No. 7968—MARCH 1965 TERM

**Appeal From the United States District Court for the
District of Colorado**

THE ORDER OF RAILROAD TELEGRAPHERS, *Appellant*,

v.

UNION PACIFIC RAILROAD COMPANY, *Appellee*.

Milton Kramer, of Schoene and Kramer, Washington, D. C. (Philip Hornbein, Jr., Denver, Colo., with him on the Brief), for Appellant.

James A. Wilcox, Omaha, Neb. (E. G. Knowles, Clayton D. Knowles, Denver, Colo., and Harry Lustgarten, Jr., Omaha, Neb., with him on the Brief), for Appellee.

Before MURRAH, Chief Judge, LEWIS and SETH, Circuit Judges.

SETH, Circuit Judge.

The opinion in this case filed by the Clerk on July 22, 1965, is hereby withdrawn, and the following substituted in its place:

This is an appeal from an order of the United States District Court for the District of Colorado, dismissing the appellant's petition for enforcement of an award of the

National Railroad Adjustment Board for failure to join an indispensable party.

The case before us is but another episode in the long-standing jurisdictional struggle between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Clerks"), and the Order of Railroad Telegraphers ("Telegraphers"). For a detailed history of the origins of this dispute, see *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 61 F.Supp. 869 (E.D.Mo.) *vacated and remanded* 156 F.2d 1 (8th Cir.), *cert. den.* 329 U.S. 758.

The facts in the controversy before the Board insofar as they are pertinent here are as follows: The dispute grew out of the action of the Union Pacific in 1952 in installing electronic equipment in its various yard offices, including the one at Las Vegas, Nevada, which brought about radical changes in the carrier's car record procedures. In the operation of these machines, a communication function previously performed by the Telegraphers is apparently automatically performed by employees represented by the Clerks. Since the basic function of the machines is to handle clerical work, the job of punching the program cards and operating the machines was assigned to clerical employees. As a result of such action the Telegraphers filed a complaint with the Adjustment Board under 45 U.S.C.A. §§ 151-188.

The Telegraphers' claim before the Board was that the carrier had violated its collective bargaining agreement with the Telegraphers by assigning the work referred to to the Clerks. They prayed that for such violations the carrier be ordered to compensate those employees represented by the Telegraphers to whom the work should have been assigned. In compliance with 45 U.S.C.A. § 153, First (j), the Board served notice upon the Clerks as "employees . . . involved in any disputes submitted to

them [the Board].” In reply, the president of the Clerks sent a letter to the Board stating the Clerks’ position that the dispute was solely between the carrier and the Telegraphers, involving interpretation of the agreement between the two, and that the Clerks would not therefore participate in the proceedings before the Board. However, the letter added that if as a result of the proceedings before the Board, work belonging to the Clerks was taken away from them by the carrier, the Clerks would take appropriate action in separate proceedings before the Board.

The proceedings before the Board resulted in an award in favor of the Telegraphers against the carrier, and the carrier was ordered to compensate idle employees covered by its agreement with the Telegraphers. Upon the carrier’s failure to comply with the award, the Telegraphers filed this action for enforcement in the District Court for the District of Colorado under 45 U.S.C.A. § 153, First (p). The carrier filed a motion to dismiss the enforcement action on the grounds the Telegraphers had failed to join an indispensable party, namely the Clerks. The court granted the motion and ordered that the Telegraphers should have thirty days from the date of the order to file an amended complaint. Upon failure of the Telegraphers to do so, the court entered final judgment of dismissal with prejudice. It is from this judgment that the Telegraphers appeal. The memorandum opinion and order granting the motion to dismiss with leave to file an amended complaint may be found at 231 F.Supp. 33.

The jurisdiction of the National Railroad Adjustment Board is as set out in the Railway Labor Act, 45 U.S.C.A. § 153, First (i). This subsection provides that the appropriate division of the Adjustment Board shall have authority over disputes between the employees and a carrier arising from interpretation or application of collective bargaining agreements and grievances arising out of such

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In the case at bar we are concerned with an interunion dispute. Two important cases of this character which have been considered by the Supreme Court are *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, and *Order of Railway Conductors v. Pitney*, 326 U.S. 561. There have also been a number of similar disputes which are considered in the opinions of the United States Court of Appeals in several Circuits. These cases all basically involve a dispute between two labor unions as to which group is entitled to particular jobs under their individual contracts with the railroad. These positions have come into dispute for the most part, as did the positions in the case at bar, by reason of the above decisions that the authority of the Adjustment Board has been established to entertain disputes of this character, although were the matter one of first impression we would have some doubt.

In the case at bar, under the existing decisions, it was necessary that the Adjustment Board give notice to the Clerks, and this was done as mentioned above. The National Railway Labor Act provides that notice be given to a party "involved" [45 U.S.C.A. § 153, First (j)]. The Act however also provides [45 U.S.C.A. § 153, First (m)] that the award shall be binding on "both" parties, and in subsections (o) and (p) reference is made only to the "carrier" and to the "petitioner." Thus the Act in some respects contemplates that there be but two parties, and the work "involved" in subsection (j) could be construed to refer to only one of these two parties. 9 Stan. L.Rev. 820. However, it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks Union. See, *e.g.*, *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d

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It is however apparent that the requirement that notice be given to the competing union in disputes of this character must be derived from the scope and nature of the issues before the Board. When the Board undertakes to enter the field of jurisdictional disputes as it has done, it is apparent that the issues considered in each petition must necessarily concern at least one other union in addition to the one filing a petition. This "concern" is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper

scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose.

The record in his case shows that the Board considered the contract of the petitioning union as if the contract with the non-petitioning union purportedly covering the same job does not exist at all. The jurisdictional dispute was thus decided in a piecemeal manner, the Board ostensibly acting under its jurisdiction to interpret a contract between a carrier and a union. Other contracts for what appeared to be the same jobs were excluded by its rules of evidence. The Supreme Court in a case concerned with the matter of notice and of primary jurisdiction of the Board said:

"We have seen that in order to reach a final decision . . . the court first had to interpret the terms of O.R.C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document', in terms of the ordinary meaning of the words and their position . . . *For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all the parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (citations omitted and emphasis added).

This statement is most important in the case at bar because the Supreme Court in the cited case, and in *Slocum v.*

Delaware, L. & W. R.R., 339 U.S. 239, has recognized the authority of the Board to consider these jurisdictional-contract disputes and should be taken as an indication as to how it should be done. If we are to consider that the Board has authority over this dispute, it must exercise it over the whole dispute at one time, not half at one time with one set of participants, and half at another. The notice requirement whatever its basis, and the Supreme Court's statements in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, that the contracts of one must be read in the light of the other, lead to the conclusion that the fundamental issues before the Board included those pertaining to the Clerks and to their contract. Their claim to the same jobs requires that the Telegraphers' contract and position be examined in the light thereof before the dispute can be realistically settled. The Clerks for all practical purposes thereby become parties to the administrative proceedings.

The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. A complete hearing would include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make an initial determination, if petitioned to act, before a court can act on a complete proceeding should it be requested to do so. *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239; *Order of Railway Conductors v. Pitney*, 326 U.S. 561.

The statutory provision that the findings and order of the Board are *prima facie* evidence of the facts therein stated [45 U.S.C.A. § 153 First (p)] when given its fullest effect still left the trial court and us with facts as to only

part of a dispute, and certainly not enough upon which to base a decision.

The District Court dismissed appellant's petition for failure to join an indispensable party—the Clerks. Had these parties been joined and appeared presumably the matters relating to their position and contract could have been presented to the court thereby filling the same void we find to exist. Our difference with the District Court is only in that the Board should under the doctrine of primary jurisdiction have the first opportunity to consider the entire controversy, including the Clerks' contract.

The disposition of the case by the trial court is **AFFIRMED**.

APPENDIX C**Judgment**

Eighth Day, July Term, Thursday, July 22nd, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges,

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the National Railroad Adjustment Board is vacated and set aside. The case is remanded to the United States District Court for the District of Colorado with directions to further remand the case to the Board in accordance with the opinion of the court. It is further ordered that The Order of Railroad Telegraphers, appellant, have and recover of and from Union Pacific Railroad Company, appellee, its costs herein and have execution therefor.

APPENDIX D**Judgment**

Seventeenth Day, September Term,
Friday, October 8th, 1965.

Before Honorable Alfred I. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges.

It is now here ordered by the court that the opinion in this cause filed on July 22, 1965, be and the same is hereby withdrawn and that the judgment of this court entered on July 22, 1965, be and the same is hereby vacated.

It is further ordered that the opinion in this cause filed October 8, 1965, be substituted for the opinion of July 22, 1965, and that the judgment of the lower court be and the same is hereby affirmed.

APPENDIX E

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 1185), 45 U.S.C., ch. 8; U.S.C.A., Title 45 secs. 151-164.

Section 153, First (i):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 153, First (j):

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Labor Management Relations Act (Pub. No. 101, 80th Cong., appd. June 23, 1947, 49 Stat. 136), 45 U.S.C., ch. 7; U.S.C.A., Tit. 29, secs 151-168

Section 160 (k):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning

of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the disputes”

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JOHN F. DAVIS, CLERK

TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,

v.

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

Respondent.

On Petition For Writ of Certiorari to the United States Court
of Appeals for the Tenth Circuit

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

CLARENCE M. MULHOLLAND
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Of Counsel:

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
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Dated at Toledo, Ohio, this
15th day of December, 1965.

RICHARD R. LYMAN
741 National Bank Building
Toledo, Ohio 43604
*Attorneys for Railway Labor
Executives' Association
As Amicus Curiae*

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PAGE

TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae.....	2
Reasons for Granting Writ.....	5
I. The Court Below Has Decided Important Questions with Respect to the Handling and Disposition of Disputes Under the Railway Labor Act in a Manner in Conflict with the Applicable Decisions of this Court	5
II. The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by this Court	7
Conclusion	10
Certificate of Service.....	11

CASES CITED

American Trucking Associations, Inc., et al., v. United States, 355 U.S. 141 (1957).....	3
Elgin, Joliet & Eastern R. Co. v. Burley, 325 U.S. 711, 723.....	6
General Committee, B.L.E. v. Missouri-K.-T. R. Co., 320 U.S. 323.....	6
Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373 (1942)	3
Railway Labor Executives' Association v. United States, 339 U.S. 142 (1950).....	3
Steele v. Louisville & N.R. Co., 323 U.S. 192, 205.....	6
Virginian Railway v. System Federation No. 40, 300 U.S. 515.....	9
Whitehouse v. Illinois Central R.R., 349 U.S. 366.....	6, 7

STATUTES

Railway Labor Act, (45 U.S.C., Sec. 151 et seq.).....	3, 6, 7, 9
Railway Labor Act, Section 3 First (h) (45 U.S.C., Sec. 153 First (h)).....	8
Railway Labor Act, Section 3 First (i) (45 U.S.C., Sec. 153 First (i)).....	8

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 652

TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,

Petitioner.

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

**On Petition For Writ of Certiorari to the United States Court
of Appeals for the Tenth Circuit**

**BRIEF OF RAILWAY LABOR EXECUTIVES'
ASSOCIATION AS AMICUS CURIAE IN
SUPPORT OF PETITION FOR CERTIORARI**

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition for certiorari filed herein by the Transportation-Communication Employees Union. The consent of all parties to the case has been obtained and such consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Railway Labor Executives' Association, on whose behalf this brief as *amicus curiae* is presented, is a voluntary unincorporated association, with which are affiliated the following standard national and international railway labor organizations:

American Railway Supervisors' Association
 American Train Dispatchers' Association
 Brotherhood of Locomotive Firemen and Enginemen
 Brotherhood of Maintenance of Way Employees
 Brotherhood Railway Carmen of America
 Brotherhood of Railway and Steamship Clerks,
 Freight Handlers, Express and Station Employees
 Brotherhood of Railroad Trainmen
 Brotherhood of Sleeping Car Porters
 Hotel & Restaurant Employees and
 Bartenders International Union
 International Brotherhood of Boilermakers, Iron
 Ship Builders, Blacksmiths, Forgers and Helpers
 International Brotherhood of Electrical Workers
 International Brotherhood of Firemen & Oilers,
 Helpers, Roundhouse & Railway Shop Laborers
 International Organization Masters, Mates & Pilots
 of America
 National Marine Engineers' Beneficial Association
 Order of Railway Conductors and Brakemen
 Railway Employees' Department, AFL-CIO
 Railroad Yardmasters of America
 Seafarers' International Union of North America
 Sheet Metal Workers' International Association
 Switchmen's Union of North America
 Transportation-Communication Employees Union

The principal office of said association is located at 400 First Street, N.W., Washington, D.C.

The foregoing organizations affiliated with the Railway Labor Executives' Association represent, for purposes of collective bargaining under the Railway Labor Act, the bulk of the nation's rail employees, and this Court has recognized the Association as the proper party to appear and speak for these affiliated organizations and their railroad employee members. *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al., v. United States*, 355 U.S. 141 (1957).

Each of these organizations is a party to collective bargaining agreements with nearly every railroad in the United States, governing the rates of pay, rules and working conditions of the craft or class of employees which it represents. Said organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application. It is their further function to provide for the selection and compensation of the labor members of the National Railroad Adjustment Board, the administrative tribunal created by the Act for final determination of such disputes in the event they cannot be settled on the property of the carrier or carriers involved; to process such disputes to the Board on behalf of the employees they represent; and to seek enforcement of the awards and orders of the Board in the event of a failure or refusal of the carrier or carriers to comply therewith.

Under the decision of the court below, an organization seeking to enforce a claim that its agreement had been violated, by assignment of work falling within the scope of that agreement to employees in another craft, must face the

prospect of having its agreement re-written, or modified, to reconcile its provisions with possible conflicting provisions in the agreement pertaining to the other craft. Such reconciliation — in effect compulsory arbitration of the subject matter of the agreements — would be effected either by the Adjustment Board or, under the holding below, by the court in an action to enforce an award of the Board in favor of the claimant organization, through a trial *de novo* to which the other organization would be an indispensable party. By the same token, organizations other than the claimant, unaware of the existence of any dispute between themselves and the carrier, would be forced before the Board and the courts to do battle for the retention of provisions in their agreements which had been achieved through voluntary collective bargaining, but which might conflict with the asserted coverage of the claimant organization's agreement. And the function of the Adjustment Board would be expanded from that of interpretation and application of agreements so as to encompass the reconciling and re-writing of conflicting agreements.

The extent to which the organizations comprising the *amicus curiae* Railway Labor Executives' Association can continue to fulfill their foregoing statutory duties and functions, and the procedures to which they must resort to do so, are directly and vitally involved in the issues in this case. Also dependent upon the determination of those issues are the future effectiveness, and the proper function and purpose, of the Adjustment Board, responsibility for the creation, operation and financial support of which is shared by these organizations. The issues in this case are thus of great concern to the *amicus curiae*, and their proper resolution by this Court is a matter of the highest importance not

merely to the petitioner organization but to railroad labor as a whole.

REASONS FOR GRANTING WRIT

I. THE COURT BELOW HAS DECIDED IMPORTANT QUESTIONS WITH RESPECT TO THE HANDLING AND DISPOSITION OF DISPUTES UNDER THE RAILWAY LABOR ACT IN A MANNER IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In this case the organization which is the petitioner before the Court submitted to the National Railroad Adjustment Board a dispute arising from a claim that the respondent carrier had violated its collective bargaining agreement with petitioner by assigning certain work to employees in another craft, represented by a different organization. The court below held that the Board had no right to resolve that dispute without making the second craft a party to the administrative proceedings, and ruling upon its contractual rights to the work in question, as well as those of the craft which had initiated the claim. Implicit in the court's opinion is the premise that in such cases the Board must resolve the "jurisdictional dispute" and award the work in question to one craft or the other, presumably exercising its statutory authority to "interpret" agreements in such a way as to insure elimination of any possible overlapping or conflict in the carrier's obligations to the crafts in question.¹

¹ Separate determination of the rights of the claimant craft under its agreement is condemned as deciding the dispute in a "piecemeal manner."

In *Whitehouse v. Illinois Central R. R.*, 349 U.S. 366, this Court stated that it had "granted certiorari because serious questions concerning the administration of the Railway Labor Act are in issue." (349 U.S., p. 370.) Those same questions are directly presented here. Although the Court's opinion in the *Whitehouse* case does not purport to answer all of the questions discussed there, and presented under the facts of this case, it did plainly state that even in the absence of any notice to the second craft, "The Board has jurisdiction over the *only necessary parties to the proceeding* and over the subject matter." (349 U.S., p. 373; emphasis supplied.) The Court also stated that it was "unquestioned" that if, as here, notice had been given to the second craft, "they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding." (349 U.S., p. 372.)

The decision below is clearly in conflict with these specific holdings in the *Whitehouse* opinion, as well as being at odds with the tenor of this Court's discussion of questions which it refrained from determining in that case.

The holding is also in conflict with this Court's decisions with respect to the limitation of the Adjustment Board's function to that of the interpretation of agreements, as contrasted with prescribing the terms of agreements or making determinations as to their validity (*Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 723; *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 205); and with respect to the non-justiciability of jurisdictional disputes in the railroad labor field, and the inability of either the courts or the Board to resolve areas of conflict in agreements of different crafts (*General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323).

II. THE COURT BELOW HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In addition to enlarging the Adjustment Board's function to include arbitration in the major disputes field, i.e., settlement of jurisdictional disputes through "reconciling" agreements rather than interpreting and applying them, the court below has decided a number of important questions with respect to the operation of the statutory machinery for settlement of minor disputes in the railroad industry, and has done so in such a manner as to seriously jeopardize its continued effectiveness. These are questions which have not yet been decided by this Court, although their existence and perplexity was noted more than ten years ago in *Whitehouse v. Illinois C.R. Co.*, 349 U.S. 366.

Thus in a dispute between a carrier and the craft petitioning the Board, with respect to the proper interpretation of the agreement between them, the court below introduces as an indispensable party a second craft whose rights depend not on the interpretation of the contract before the Board, but upon the interpretation of its own separate contract with the carrier. And although in the instant case the second craft was in fact given notice of the pending dispute and an opportunity to participate, its failure to do so, in the court's opinion, renders the Board's award invalid because in arriving at it the Board failed to treat the second craft as if it were a participating party, and did not purport to issue an adjudication as to the second craft's contractual rights.

Furthermore, although jurisdiction of the Board under the Railway Labor Act is predicated upon the existence of

a dispute which remains unsettled after it has been completely handled on the property of the carrier "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" (45 U.S.C. Sec. 153 First (i)), the opinion of the court below would force the second craft before the Board for settlement of a dispute which not only had not been handled on the property, but which it did not know existed.

It should also be noted that under the statute (45 U.S.C. Sec. 153 First (h)), the Adjustment Board is composed of four divisions, each of which has jurisdiction only over disputes involving specified crafts and classes of employees, and "whose proceedings shall be independent of one another." This allocation of jurisdiction and functions is clearly calculated to enhance the advantages, frequently noted by this Court, of having these minor disputes referred to and decided by panels of experts peculiarly familiar with the problems and grievances which have customarily arisen with respect to the workers whose claims are being passed upon. In a number of instances a craft which is the petitioner before one division of the Board has charged a carrier with violating its agreement by assignment of work to members of another craft whose grievances and contract claims lie within the jurisdiction of a different division of the Board. Under the decision below, the second craft would be forced to submit to a declaration of its rights by a division having no jurisdiction over its disputes, and composed of members unfamiliar with the problems, customs and practices pertaining to the aspect of railroad operations in which its members were engaged. Jurisdictional objections aside, such a holding goes far to defeat the Congressional objective of having these disputes resolved by experts in their field.

And finally, the decision below would subject both the petitioner craft and the second craft to the vagaries of having their agreements construed in the light of others the negotiation and consummation of which was without notice to or participation by them, and in which their involvement was expressly prohibited by the statutory mandate that the carrier bargain with the certified craft representative and no other. *Virginian Railway v. System Federation No. 40*, 300 U.S. 515.

The manner in which the court below has resolved these issues represents a serious threat to the continued effectiveness of the National Railroad Adjustment Board as an instrumentality for the fair and expeditious settlement of disputes over the interpretation of railroad collective bargaining agreements. It further constitutes a perversion of the Board's statutory function, by extending its jurisdiction to the making of agreements for the parties, instead of interpreting those arrived at by the voluntary processes contemplated by the Railway Labor Act. The continuing frequency of litigation such as this, and the accompanying uncertainty and frustration resulting from the dragging out of these so-called minor disputes, points up the pressing need for a determination of these questions by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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Dated at Toledo, Ohio, this
15th day of December, 1965.

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Labor Executives' Association, as *amicus curiae*, do hereby certify that on the 15th day of December, 1965, I served a copy of the brief of Railway Labor Executives' Association as *amicus curiae* in support of petition for certiorari upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Milton P. Kramer, Lester P. Schoene and Martin W. Fingerhut, 1625 K Street, N.W., Washington, D.C., 20006, Attorneys for petitioner, Transportation Communication Employees Union; James A. Wilcox and Harry Lustgarten, Jr., 1416 Dodge Street, Omaha, Nebraska, 68102, and E. G. Knowles and Clayton D. Knowles, 560 Denver Club Building, Denver, Colorado, 80202, Attorneys for respondent, Union Pacific Company.

.....
Richard R. Lyman

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**In the
Supreme Court of the United States**

October Term, 1966

~~No. 652~~ 28

**TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,**

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Pages
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Argument	13
1. Under This Court's Decisions, the Adjustment Board was Required to Decide the Entire Work Assignment Dispute—Not Just a Part of it.	14
2. The Enforcement Action was Properly Dismissed Because of the Absence of an Indispensable Party.	29
Conclusion	32
Appendix A	1a
Appendix B	8a
Appendix C	11a

CASES CITED

Allain v. Tummon (CA-7, 1954), 212 F. 2d 32	7, 29, 32
Brennan v. Delaware, L. & W. R. R. (N. Y., 1952), 303 N. Y. 411, 103 N. E. 2d 532, cert. den. (1952), 343 U. S. 977	16
Brotherhood of Railroad Trainmen v. Swan (CA-7, 1954), 214 F. 2d 56	31
Carey v. Westinghouse Electric Corporation (1964), 375 U. S. 261	4, 19, 26, 27
Elgin, J. & E. Ry. v. Burley (1945), 325 U. S. 711	30

TABLE OF CONTENTS—Continued

	Pages
General Committee, B. L. E. v. Missouri-K.-T. R. (1943), 320 U. S. 323 _____	22, 23
Green v. Brophy (CA-DC, 1940), 110 F. 2d 539 _____	31
Griffin v. Chicago Union Station (DC-ND, Ill., 1936), 13 F. Supp. 722 _____	32
Gunther v. San Diego & A. E. Ry. (U. S. December 8, 1965), 34 U. S. Law Week 4058 _____	24, 29, 30
Hunter v. Atchison, T. & S. F. Ry. (CA-7, 1948), 171 F. 2d 594 _____	31
International Bro. of Carpenters v. C. J. Montag & Sons (CA-9, 1964), 335 F. 2d 216, cert. den. 379 U. S. 999 _____	24, 28
International Brotherhood of Firemen and Oilers v. International Association of Machinists (CA-5, 1964), 338 F. 2d 176 affirming 234 F. Supp. 858 _____	27
J. I. Case Co. v. National Labor Relations Board (1944), 321 U. S. 332 _____	22
Kirby v. Pennsylvania R. Co. (CA-3, 1951), 188 F. 2nd 793 _____	32
Missouri-K.-T. R. v. Brotherhood of Ry. & S. S. Clerks (CA-7, 1951), 188 F. 2d 302 _____	7, 29
Missouri-K.-T. R. v. National Railroad Adjustment Board, et al. (DC-Ill., 1950), 26 L. R. R. M. 2237 _____	7
Missouri-K.-T. R. v. National Railroad Adjustment Board, et al. (DC-Ill., 1954), 128 F. Supp. 331 _____	7, 18, 32
National Labor Relations Board v. Local 1291, Inter- national Longshoremen's Ass'n. (CA-3, 1965), 345 F. 2d 4, cert. den. October 25, 1965 _____	21
National Labor Relations Board v. Local 19, Inter- national Brotherhood of Longshoremen (CA-7, 1961), 286 F. 2d 661, cert. den. 368 U. S. 820 _____	22

TABLE OF CONTENTS—Continued

	Pages
National Labor Relations Board v. Radio & Television Broadcast Engineers Union (1961), 364 U. S. 573	18, 19, 20, 21, 24
Order of Railroad Telegraphers v. New Orleans, T. & M. Ry. (CA-8, 1956), 229 F. 2d 59, cert. den. 350 U. S. 997	18, 25, 29, 30
Order of Railroad Telegraphers v. Railway Express Agency, Inc. (1944), 321 U. S. 342	22
Order of Railway Conductors v. Pitney (1946), 326 U. S. 561	12, 14, 15, 16, 17, 19, 23
Order of Railway Conductors v. Swan (1947), 329 U. S. 520	28
Seaboard Air Line R. R. v. Castle (DC-Ill., 1958), 170 F. Supp. 327	28
Shields v. Barrow (1854), 21 U. S. 409, 17 How. 130	30
Slocum v. Delaware, L. & W. R. (1950), 339 U. S. 239	12, 16, 17
Texas & N. O. R. v. Brotherhood of Ry. & S. S. Clerks (1930), 281 U. S. 548	22
Textile Workers Union of America v. Lincoln Mills (1957), 353 U. S. 448	21
U. S. Pipe and Foundry v. National Labor Relations Board (CA-5, 1962), 298 F. 2d 873, cert. den. 370 U. S. 919	22
Virginian Ry. v. System Federation No. 40 (1937), 300 U. S. 515	22, 23
Whitehouse v. Illinois Central R. Co. (1955), 349 U. S. 366	7, 12, 25, 26

STATUTES

	Pages
Railway Labor Act, 45 U. S. C. 151-164, 48 Stat. 1185:	
Section 151a(5)	18
Section 2 Ninth	21, 23
Section 3 First (i)	5, 12, 15, 20
Section 3 First (j)	6, 7, 9
Section 3 First (l)	7, 19
Section 3 First (m)	10, 30
Section 3 First (n)	20
Section 3 First (p)	3, 10, 11
Labor Management Relations Act, 29 U. S. C. 151-168, 61 Stat. 136:	
Section 10(k)	18, 19, 20

MISCELLANEOUS

Fed. R. Civ. P. 14(a)	11
Fed. R. Civ. P. 19(b)	11
Third Division Award 8258 (Third Division Reports Vol. 79, p. 829)	6, 7
Third Division Award 8656 (Third Division Reports Vol. 83, p. 337)	6, 8, 9, 30
Third Division Award 9988 (Third Division Reports Vol. 96, p. 286)	3, 5, 6, 10, 20, 29, 30
Report of G. E. Leighty to Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers, Chicago, Illinois, June, 1960	5

**In the
Supreme Court of the United States**

October Term, 1965

No. 652

**TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,¹**

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

For the reasons herein detailed, Respondent, Union Pacific Railroad Company, opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in that Court's case No. 7968.

OPINIONS BELOW

The opinion of the district court is reported at 231 F. Supp. 33. The first opinion of the court of appeals

¹ Formerly "The Order of Railroad Telegraphers."

dated July 22, 1965, is reported at 349 F. 2d 408. (Pet. pp. 1a-7a)² That court's second opinion dated October 8, 1965 (Pet. pp. 8a-15a), is not yet officially reported. It is unofficially reported at 60 L. R. R. M. 2244.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. (Pet. p. 4)

QUESTIONS PRESENTED

(1) Whether the National Railroad Adjustment Board in deciding an interunion work-assignment jurisdictional dispute must consider and determine the entire dispute or controversy including the contracts, usage, practices and customs of both claiming unions where the union representing employees performing the disputed work was determined by the Board to be involved and given notice of the proceeding but, in pursuance of an agreement of all railroad unions declined to participate therein but has stated that if as a result of the Adjustment Board proceedings any work is taken away from employees it represents, redress will be sought by it in separate proceedings against the railroad.

(2) Whether, in an action brought in a U. S. District Court to enforce an award of the National Railroad Adjustment Board sustaining the claim of the union representing telegraph employees to certain work

² "Pet." refers to the Supplemental Petition for a writ of certiorari filed herein. "R" refers to the "Transcript of Record" filed in the court of appeals below. "RLEA Br." refers to the brief of the Railway Labor Executives' Association as *amicus curiae*.

which is being performed by clerical employes the union representing clerical employes performing the disputed work is an indispensable party to such action where, in addition to monetary penalties, a coercive decree is sought which would take the disputed work from clerical employes, and where there may be questions as to the validity or enforceability of such award which might be raised and decided in such action.

 O

STATUTES INVOLVED

The pertinent sections of the Railway Labor Act³ and the Labor Management Relations Act⁴ are set forth in Appendix A, *infra*.

 O

STATEMENT

This case is a statutory action brought under Section 3, First (p) of the Railway Labor Act⁵ to enforce Award 9988 of the Third Division of the National Railroad Adjustment Board. (R. pp. 1-4)⁶ There is involved a

³ 44 Stat. 577 (1926), 48 Stat. 1185 (1934), 45 U.S.C. §§ 151-164 (1964).

⁴ 61 Stat. 136 (1947), 29 U.S.C. §§ 151-168 (1964).

⁵ 45 U.S.C. § 153, First (p).

⁶ A printed pamphlet copy of Third Division Award 9988 is included in the record filed herein by Petitioner. It is also contained in the official reports of the National Railroad Adjustment Board. 96 N.R. A.B. (3d Div.) 286. Page references to Award 9988 are to the pages of the printed pamphlet copy. The printed "award" consists of (1) "Statement of Claim," p. 1, (2) "Employee's Statement Of Facts," p. 1, (3) "Position of Employees," p. 3, (4) "Carrier's Statement of Facts," p. 24, (5) "Position of Carrier," p. 30, (6) "Opinion of Board," p. 43, (7) "Findings," p. 47, (8) "Award," p. 47, (9) "Dissent to Award 9988," p. 47, and (10) "Answer to Dissent," p. 61.

so-called jurisdictional dispute as to which class of employees should be assigned to perform certain work functions between two competing railroad unions, one representing clerical employees and the other telegraphers, the former having performed the work involved for over 12 years. This is a "work-assignment" type of jurisdictional dispute—the conflict being between two groups of employees each represented by a different union and each claiming the exclusive right to the assignment of the work. It is distinguished from the "representational" type of jurisdictional dispute involving a controversy as to which union should represent the employees doing particular work. See *Carey v. Westinghouse Electric Corporation* (1964), 375 U. S. 261, 263.

In 1952, Respondent, Union Pacific, installed IBM office machines in its various yard offices which radically changed the maintenance of railroad car records—work traditionally performed by clerical employees. In the operation of these machines, a communication function previously performed manually by telegraph employees, represented by Petitioner, Transportation-Communication Employees Union (TCU), is now performed when the machines handle certain clerical functions previously performed manually by clerical employees, represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (BRC).⁷

⁷ Grand President Leighty of TCU has described the operation of these machines as follows:

" * * * The International Business Machine Company brought to the railroad industry the IBM machine in the last few years, which
(Footnote 7 continued on next page)

The basic function of the IBM machines was the performance of clerical work and clerical employees were assigned the work of punching IBM cards and operating the machines. TCU filed a grievance, known in the railroad industry as a "claim," asserting that such work, including the card punching, belonged exclusively to telegraph employees, that its assignment to and performance by clerical employees was in violation of the collective agreement between TCU and Union Pacific, and that such work should be assigned to telegraph employees. TCU also sought continuing penalty payments consisting of eight hour's pay for each eight-hour shift, both day and night, since August 25, 1952. (Award 9988, pp. 1-3)

TCU filed two such claims, one involving the work assignment at Las Vegas, Nevada, and the other at Salt Lake City, Utah. These were handled in the usual manner and ultimately filed as separate disputes by TCU with the Third Division of the Adjustment Board under Section 3, First (i) of the Act.⁸ The records in the two

(Footnote 7 continued from previous page)

can combine the work of the clerical employee, for example, who before prepared the communication and gave it to the telegrapher to transmit, and the work of the telegrapher, because it actually transmits the communication which formerly was transmitted by the telegrapher. Thus, as the clerk does the work on the IBM which he formerly did on the typewriter, preparing a communication for transmission, this machine at the same time cuts the tape the simpler machine (the teletype) used to cut in the telegraph office, and with the assistance of reperforators or a wire chief in combining circuits, this clerk can also in most cases from his clerical station do the actual transmitting in one operation." (Report of G. E. Leighty to Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers, Chicago, Ill. June, 1960, quoted in Third Division Award 9988 at page 56.)

⁸ 45 U. S. C. § 153, First (i).

dockets were identical as to the work-assignment dispute.⁹ The factual statements and argument of TCU and Union Pacific concerning the work-assignment dispute were detailed in the docket covering the dispute at Salt Lake City (resulting in Award 8258, 79 N. R. A. B. (3d Div.) 829, and Award 8656, 83 N. R. A. B. (3d Div.) 337)¹⁰ and incorporated by reference in the Las Vegas docket what was said by each in the Salt Lake City docket. (Award 9988, p. 29)

In both disputes, Union Pacific contended that since the objective of the grievances was the taking of work from clerical employees they were "involved" and that the Board would be without jurisdiction unless they or their collective representative, BRC, were notified and permitted to participate as required under Section 3, First (j) of the Act.¹¹ TCU denied that the clerks had any interest in the dispute insisting that all that was involved was the interpretation of TCU's agreement with Union Pacific.

The Salt Lake City and Las Vegas disputes, although filed with the Board at the same time, became separated and the Salt Lake City dispute was reached first. The Board refused to notify BRC of the dispute

⁹ The Las Vegas dispute (resulting in Award 9988) involved an additional factor, i. e., the delivery of train orders to train crews by clerical employees. That portion of the claim was denied and is not here involved. (Award 9988, p. 43)

¹⁰ Unless otherwise indicated, all Adjustment Board awards cited herein are of the Third Division.

¹¹ 45 U. S. C. § 153, First (j).

7

because of the opposition of the labor members.¹² The Board deadlocked on the merits and a referee was appointed under Section 3, First (1)¹³ and in Award 8258,

¹² At that time, it was the policy of the various railroad labor organizations and followed by the labor members on the Adjustment Board in work-assignment jurisdictional disputes to refuse to give notice under Section 3, First (j) and to prohibit participation in Board proceedings by anyone except the involved railroad and the petitioning union. *Whitehouse v. Illinois Central R. Co.* (1955), 349 U.S. 366, 372, *Allain v. Tummon* (CA-7, 1954), 212 F. 2d 32, 35.

This policy is detailed in Appendix B, *infra*, p. 8a, containing excerpts from the Findings of Fact entered in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.* (DC-Ill., 1954), 128 F. Supp. 331. That long and protracted litigation, a part of the long-standing jurisdictional dispute between BRC and TCU, involved a series of Adjustment Board awards rendered in proceedings brought separately by TCU and BRC, resulting in the same work being assigned to both telegraphers and clerks. Indeed, BRC and TCU had filed separate enforcement actions in U.S. District Courts in Missouri and Texas seeking to compel M-K-T to comply with some of the awards. (128 F. Supp. at 362) At the Adjustment Board neither union was notified of nor permitted to participate in the disputes filed by the other. In an effort to have the matter resolved, M-K-T filed an action in the U.S. District Court at Chicago, Illinois, seeking to set aside the awards, enjoin their enforcement and to have the Board consolidate all cases, serving notice on both TCU and BRC and allowing both to participate in the consolidated hearing. A preliminary injunction was granted. *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.* (DC-Ill., 1950), 26 L. R. R. M. 2237, affirmed sub nom. in *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks* (CA-7, 1951), 188 F. 2d 302. After trial, a permanent injunction was entered. 128 F. Supp. 331. The challenged Board awards were held void. TCU and BRC were enjoined from enforcing the awards by court action or otherwise and a mandatory injunction issued ordering the Adjustment Board to reopen and consolidate all of the cases allowing full participation, after notice, by both TCU and BRC. The court directed that the Board should in deciding these consolidated cases consider the agreements of both BRC and TCU as well as the custom and practice thereunder. The work-assignment disputes were to be finally decided in one proceeding with both TCU and BRC participating. 128 F. Supp. 331 at 372-375. An appeal was taken by TCU and BRC and all individual defendants which they later dismissed. The Adjustment Board, pursuant to the district court's decree and injunction, reopened the dockets, consolidated them, and issued the required notice to the involved employees, TCU, BRC and the railroad carriers advising of the hearing and further handling in a consolidated docket. However, before the scheduled hearing was held, BRC and TCU each withdrew these disputes from the Board, thereby aborting any further Board action. See Judge Minor's order in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, No. 50 C. 684, dated June 24, 1958.

¹³ 45 U. S. C. § 153, First (1).

he held that BRC was "involved" and refused to proceed to consideration of the merits until notice had been given by the Board "to the parties, Carrier, Order of Railroad Telegraphers, and Brotherhood of Railway Clerks." 79 N. R. A.B. (3d Div.) 829, 864.

Notice was given to BRC and the Adjustment Board, with the same referee, again considered the dispute, rendering its Award 8656 on January 12, 1959, in which it held that the disputed work was properly assigned to the clerical employees and that TCU's agreement was not violated. 83 N. R. A. B. (3d Div.) 337.

More than two years later, the same work-assignment dispute, but which arose at Las Vegas, was considered by the Adjustment Board. In the meantime, the various railroad labor organizations affiliated together as the Railway Labor Executives' Association (RLEA) had changed their policy as to the giving of notice in these work-assignment disputes. In June, 1959, RLEA agreed that in these work-assignment disputes "third party" notices to the other union would be issued by the Board. The labor organizations also agreed upon a letter to be used as a reply by any union so notified and that such union would "not otherwise appear or participate in the proceeding."¹⁴

¹⁴ This policy understanding is set forth in Interrogatory No. 1 and Answer thereto in Interrogatories to the Plaintiff dated December 9, 1964, and Answers dated December 18, 1964, filed in *The Order of Railroad Telegraphers v. Southern Pacific Company*, No. Civ. 4812-Phx., pending in the U. S. District Court for the District of Arizona. A certified copy of these documents has been lodged with the Clerk of this Court. At the oral argument before the court of appeals below, these documents were accepted by and were before that court after counsel for TCU had stated he had no objection. The policy declaration referred to and attached to the Answers to the Interrogatories is reproduced in Appendix C, *infra*, p. 11a.

Thus, in the Las Vegas dispute, the Board, pursuant to Section 3, First (j) of the Railway Labor Act,¹⁵ notified BRC of the hearing advising that it could "appear and file papers and documents." (R. p. 7) At that time and for some time previous, clerical employees represented by BRC were performing the work claimed by TCU. Nevertheless, President George M. Harrison of BRC wrote the Adjustment Board the RLEA-prescribed letter (Appendix C, *infra*, p. 14a), in which he stated that it was his "understanding" that the dispute was simply one between TCU and Union Pacific involving an interpretation of TCU's agreement with Union Pacific and that neither BRC nor the clerical employees it represented were involved in the dispute. The President of BRC asked the Board to advise him if his "understanding of the nature of the dispute" were incorrect. (The Board did not answer this letter.) The letter also stated the rights of Union Pacific clerical employees were "predicated" upon BRC's agreement with Union Pacific. The BRC President recognizing that resolution of the dispute might adversely affect clerical employees made it clear that if as a result of the Board proceedings any work belonging to BRC was taken away from the clerical employees, BRC would proceed separately against Union Pacific before the Board "to correct any such violation of our agreement." (R. p. 8) The BRC made no appearance and filed no further papers in the dispute.

Award 8656, covering the work-assignment dispute at Salt Lake City, held the work was properly assigned

¹⁵ 45 U. S. C. § 153, First (j).

to clerical employees and that TCU's agreement was not violated. This determination was "final and binding" under Section 3, First (m).¹⁶ However, the Adjustment Board in Award 9988 (with a different referee) sustained TCU's claim as to a violation of TCU's agreement, finding that the work was improperly assigned to clerical employees and that such work should be assigned to telegraph employees. The Board also directed that Union Pacific should pay the "senior idle employee covered by the Telegraphers' Agreement" a day's pay for each 8-hour shift when the machines were used. (Award 9988, p. 47) The Adjustment Board did not consider the BRC Agreement, or the custom, practices or claims thereunder. (Award 9988, pp. 44-46)¹⁷

Union Pacific did not comply with the award and TCU filed this enforcement action, under Section 3, First (p),¹⁸ in the District Court for the District of Colorado. In its prayer for relief, TCU asked that the court enforce the award "by writ of mandamus or otherwise" and, in addition, that Union Pacific be ordered to "make an accounting of all monies due" under the award. (R. p. 4)

Union Pacific's motion to dismiss was sustained by the district court on its determination that BRC was

¹⁶ 45 U. S. C. § 153, First (m).

¹⁷ The court below found that the Board considered TCU's contract as if BRC's contract did not exist. (Pet. p. 13a).

¹⁸ 45 U. S. C. § 153, First (p).

an indispensable party to the enforcement action.¹⁹ (R. p. 16) The district court found that the Adjustment Board had made BRC a party to the proceedings before it (R. p. 14)²⁰ and held BRC to be "indispensable to a determination of the same issues in a trial *de novo* before the Court." (R. p. 14) TCU failed to make BRC a party defendant although given that opportunity and final judgment of dismissal with prejudice was entered (R. pp. 17-18) from which it appealed to the United States Court of Appeals for the Tenth Circuit.

The court of appeals, in an opinion dated July 22, 1965, found that the Board had failed to construe TCU's contract with regard to, and with reference to BRC's position and contract and vacated the award. The court remanded the case to the Board to hold "a complete hearing" which should "include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties." (Pet. p. 7a)

On October 8, 1965, the court below withdrew its prior opinion and judgment,²¹ substituting therefor a different opinion and judgment (Pet. pp. 8a-16a) in

¹⁹ In the district court, TCU suggested Union Pacific should have utilized the third party procedures provided under Rules 14(a) and 19(b) of the Federal Rules of Civil Procedure. But it was shown that the dispute involved work being performed by clerical employees at Las Vegas, Nevada, and the unit of BRC which represented clerical employees at Las Vegas was limited geographically to the territory from Ogden, Utah to Los Angeles, California. TCU did not raise the point in the court of appeals below.

²⁰ TCU did not challenge this holding in the court below.

²¹ Union Pacific had filed a petition for rehearing before the court of appeals limited to the question of the jurisdiction of the court to remand the case to the Adjustment Board under Section 3, First (p) and a motion for permission to file it out of time. The court did not act on these further pleadings.

which it affirmed the district court's judgment of dismissal for lack of an indispensable party and also because the Board had failed to properly exercise its primary jurisdiction. (Pet. p. 14a) The court pointed out that if BRC had been joined in the enforcement action "the matters relating to their [BRC] position and contract could have been presented to the court thereby filling the same void we find to exist." (Pet. p. 15a)

The court of appeals recognized this case as "but another episode in the long-standing jurisdictional struggle" between BRC and TCU. (Pet. p. 9a) It found that the authority and jurisdiction of the Adjustment Board under Section 3, First (i)²³ over this type of a work-assignment dispute was clearly established in the *Pitney*²⁴ and *Slocum*²⁵ cases. It also said that "it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks' Union." (Pet. p. 11a) The notice requirement, the court said, is derived from the "scope and

²² Before the court of appeals, Union Pacific's argument was essentially premised upon the indispensable party issue. In its brief, however, Union Pacific pointed out that under this Court's decisions in *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U.S. 239, and *Order of Railway Conductors v. Pitney* (1946), 326 U.S. 561, the Adjustment Board in the proper exercise of its jurisdiction should have considered TCU's contract in the light of others between the Union Pacific and BRC whose members were performing the claimed work, and contended that in the anticipated trial de novo, the district court should exercise that same jurisdiction and consider those same matters. The Board's failure to consider the BRC contract and its conflicting work claims was not directly challenged because of the assumption that the opportunity for a trial de novo in the district court would make any such position premature, in that this error might still be corrected or resolved in such trial. See *Whitehouse v. Illinois Central R. Co.* (1955), 349 U.S. 366.

²³ 45 U.S.C. § 153, First (i).

²⁴ *Order of Railway Conductors v. Pitney* (1946), 326 U.S. 561.

²⁵ *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U.S. 239.

nature of the issues before the Board" (Pet. p. 12a), rejecting the idea that scope and nature of the issues in a work-assignment dispute are to be derived only from the manner in which TCU might have framed its claim, pointing out that since there is "but one job or classification which is sought for the members of two different and competing unions," the "concern" of the other union was a "very real one." (Pet. p. 12a)

According to the court below "the fundamental issues before the Board included those pertaining to the Clerks and to their contract" and "the Clerks for all practical purposes thereby become parties to the administrative proceedings." With the real issues of the inter-union dispute thus defined and the Board's jurisdiction established, it follows that "the Board must exercise" its authority "over the whole dispute at one time, not half at one time with one set of participants, and half at another" time. (Pet. p. 14a) Since the Adjustment Board decided telegraph employes' rights with reference only to TCU's agreement, the court held the Board had failed to decide the actual dispute presented for decision and thus had failed to meet the responsibilities of its primary jurisdiction.

ARGUMENT

The decision of the Court of Appeals for the Tenth Circuit is correct and is not in conflict with the decision of any other circuit or of this Court. There is no occasion for further review.

1. Under This Court's Decisions, the Adjustment Board was Required to Decide the Entire Work-Assignment Dispute - Not Just a Part of it.

Twenty years ago this Court in *Order of Railway Conductors v. Pitney* (1946), 326 U. S. 561, held that interunion disputes involving work assignments in the railroad industry were to be resolved by the National Railroad Adjustment Board. This Court said that agency was especially created to "interpret contracts such as these in order *finally to settle* a labor dispute,"²⁶ and that it was "peculiarly competent to handle the basic question here involved," *id.* at 565, 566.

There was involved a work-assignment dispute between two unions (ORC and BRT) each claiming that its respective agreements with the railroad reserved the same work to the employees whom they represented. ORC filed suit in a U. S. District Court, sitting as a bankruptcy reorganization court, asking it to instruct its railroad trustees to assign the disputed work to conductors represented by it instead of those represented by BRT. An injunction was sought, BRT intervened and the matter was referred to a master who found that the work should be assigned to BRT conductors. The court of appeals dismissed on the basis that the dispute was exclusively within the jurisdiction of the Adjustment Board, 145 F. 2d 351. On certiorari, this Court affirmed stating that the remedies of the Railway Labor Act for the settlement of this kind of dispute were exclusive. It was pointed out that a determination of the dispute required an "in-

²⁶ Emphasis is supplied unless otherwise indicated.

terpretation of *these contracts*" and under Section 3, First (i) of the Railway Labor Act,²⁷ "the court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad." Dismissal of the action was stayed, however, "so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements." *Id.* at 568.

Justice Black, speaking for this Court, pointed out what was required of the Adjustment Board in deciding these work-assignment disputes:

" * * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. [Citations omitted.] *For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. * * * " (*Id.* at 566)

On this problem, the Court's decision in *Pitney* was unanimous; Justice Rutledge dissented, but on another point. He agreed that the district court should retain jurisdiction "pending interpretation of the agreements," *id.* at 567, 568, but felt that ORC was entitled to

²⁷ 45 U. S. C. § 153, First (i).

an injunction until the Board had acted. That he was otherwise in agreement with the majority is shown in his dissent:

" * * * This in turn will depend upon the effect which the Board finds should be given to the prior agreements, including not only the 1940 contract with O. R. C., but the basic agreements of 1927 and 1928 with O. R. C. and B. R. T., respectively, as affected by the establishment of switching limits in 1929 and other matters bearing upon the interpretation of the written contracts and the rights of the parties." (*Id.* at 569, n. 2)

A few years later in *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, this Court was again faced with an interunion work-assignment dispute similar to that in *Pitney* and here. TCU and BRC were each claiming under their separate agreements with the railroad certain jobs for its members. The railroad had assigned the work to clerks. TCU protested, urging re-assignment to telegraph employees and claiming back pay. The railroad brought a declaratory judgment in a New York court. On certiorari, this Court, after noting that these work-assignment cases "involving the railroad and *two* employee accredited bargaining agents" furnish a "potent cause of friction," (*Id.* at 243, 244) reaffirmed and re-emphasized the decision in *Pitney*:

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive." (*Id.* at 244)

See also, *Brennan v. Delaware, L. & W. R. Co.* (N. Y., 1952), 303 N. Y. 411, 103 N. E. 2d 532, cert. den. (1952) 343 U. S. 977.

TCU's challenge of the decision of the court of appeals below is based upon a narrow construction of Section 3, First of the Act²⁸ and an even more restrictive reading of *Pitney* and *Slocum*. There is no basis for TCU's suggestion that this Court in *Pitney* and *Slocum* was unaware that in each of those cases there were two competing unions seeking the performance of the same work. The issue in those cases, according to TCU, was simply whether a court could "entertain a suit alleging a breach of collective bargaining agreements between a railroad and a union involving an assignment of work." (Pet. p. 14) Indeed, TCU argues that the only lesson offered by these two cases is that the Adjustment Board need only "consider all evidence including other agreements." (Pet. p. 15) Finally, TCU argues that under these cases this Court held the agreement of the other union should be considered "*merely as an aid* in interpreting the agreement forming the basis of the claim." (Pet. p. 16) But this is not, we submit, what this Court held in *Pitney* and *Slocum*, nor is it what Congress intended in Section 3 of the Act.

Adjustment Board handling of interunion work-assignment disputes would thus be reduced to an exercise in futility. The court below correctly decided that the Act did not intend that these jurisdictional disputes be decided in a "piecemeal manner." (Pet. p. 13a) The Act was intended "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements.

²⁸ 45 U. S. C. § 153, First.

* * * ²⁹ But under the erroneous concept advanced by TCU nothing would be resolved—indeed, every time the Adjustment Board decided a work-assignment dispute in favor of the claiming union another dispute would be created. And this is exactly what happened on the Missouri-Kansas-Texas Railroad as detailed in footnote 12, *supra*, at page 7. *Missouri-Kansas-Texas R. Co. v. N.R.A.B., et al.* (DC-Ill., 1954), 128 F. Supp. 331. See, also, *Order of Railroad Telegraphers v. New Orleans, Texas & M. R. Co.* (CA-8, 1956), 229 F. 2d 59, cert. den. 350 U. S. 997.

In *Labor Board v. Radio & Television Broadcast Engineers Union* (1961), 364 U. S. 573, this Court clearly recognized that to decide a work-assignment dispute such as this meant a decision of the whole dispute, including which union should perform the work:

“ * * * Any decision short of that would obviously not be conducive to quieting a quarrel between two groups which, here as in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone. * * * ” (*Id.* at 579)

This Court correctly refused to accept any narrow reading of Section 10(k) of the Labor Management Relations Act.³⁰ That section provided the NLRB should “hear and determine the dispute” referring to the same type of dispute as here—a work-assignment dispute determinable by interpretation of existing agreements. Justice Black, speaking for a unanimous court, rejected

²⁹ 45 U. S. C. § 151a(5).

³⁰ 29 U. S. C. § 160(k).

NLRB's arguments that this language limited it "to strictly legal considerations growing out of prior Board orders, certifications or collective bargaining agreements," *id.* at 578, saying:

"We conclude therefore that the Board's interpretation of its duty under § 10(k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision. * * *" (*Id.* at 586)

Only recently, in *Carey v. Westinghouse Electric Corporation* (1964), 375 U.S. 261, 275, (dissent) Mr. Justice Black pointed out that in both the Labor Management Relations Act and the Railway Labor Act, Congress hoped to "abate" jurisdictional disputes "between unions over which union members would do certain work," citing *Radio & Television Broadcast Engineers Union* and *Pitney* (*Id.* at 275, n. 2)³¹

Congress' use of the words "make an award" in Section 3, First (1) of the Railway Labor Act,³² indicates a clear intention that the disputes or controversies in their entirety were to be resolved. There is no basis for suggesting that Congress intended the Adjustment Board should only half-decide these disputes on a piecemeal basis. To do so would be contrary to the basic and un-

³¹ Mr. Justice Black also noted that in these situations the employer "has done nothing wrong" and to subject him to damages was contrary "to the basic principles of common everyday justice." 375 U.S. 261, 275.

³² 45 U.S.C. § 153, First (1).

derlying general purposes of the Act and the general duties imposed.

TCU suggests such an approach should be rejected here, arguing that the Adjustment Board's jurisdiction is limited to "a determination of whether the collective bargaining agreement has been violated." (Pet. p. 14, footnote.) This has been TCU's argument advanced over the years, indeed by all of the railroad unions—an approach, we submit, which only serves to frustrate any possible, meaningful settlement of these disputes. It finds no sanction in the Railway Labor Act, which in language similar to Section 10(k) tells the Adjustment Board it is "to make an award with respect to any dispute submitted to it."³³ And the Board's jurisdiction extends over all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."³⁴ In short, TCU and RLEA argue, despite the similarity of language and purpose, that the Adjustment Board should be limited as the NLRB before *Radio & Television Broadcast Engineers Union* held that Section 10(k) meant what it said.

Both TCU and RLEA assume that the scope and issues of a work-assignment dispute before the Adjustment Board can be limited simply by the careful framing of their grievances ("Statement of Claim," Award 9988, p. 1) so as to make it appear that all that is involved is an interpretation of a collective agreement.

³³ 45 U. S. C. § 153, First (n).

³⁴ 45 U. S. C. § 153, First (i).

The court below properly rejected this "horse blinders" concept and recognized that the issues of a dispute must be derived from a consideration of all of the facts.³⁵

Both TCU and RLEA also erroneously assume that these work-assignment disputes present only the question of whether a railroad has bound itself by "overlapping contracts" to both TCU and BRC. (Pet. p. 20, RLEA Br. p. 5) It is argued that both unions could have a contractual right to the same work and thus each union's claim of work right should be decided only in the context of that union's contract. The court of appeals below rejected such an argument and correctly recognized that this was not a case of "overlapping" or inconsistent contracts, that only one of the two competing unions could have the lawful right to claim a given work assignment, and that the Board's function was to resolve the entire dispute. While inconsistent contracts might have been possible at common law, this is not the situation under the national labor policy as expressed in the labor acts. See *Textile Workers v. Lincoln Mills* (1957), 353 U. S. 448, 456-457, and *Labor Board v. Radio & Television Broadcast Engineers Union* (1961), 364 U. S. 573.

Railroads no longer have the right to treat with or contract with respect to a given subject matter with whomever they might otherwise choose. Under Section 2, Ninth,³⁶ once a collective bargaining representative

³⁵ The Court of Appeals for the Third Circuit said such a contention had an "attractive simplicity" but nevertheless rejected it as being "an unacceptable means of avoiding a jurisdictional dispute." *National Labor Relations Board v. Local 1291, International Longshoremen's Association* (CA-3, 1965), 345 F. 2d 4, 8, 10, cert. den. October 25, 1965.

³⁶ 45 U. S. C. § 152, Ninth.

is selected to represent employes performing a given classification of work, the railroad is obligated to treat only with that representative for all purposes of collective bargaining.

As RLEA recognizes (RLEA Br. p. 9), this section "imposes the affirmative duty to treat only with the true representative, and *hence the negative duty to treat with no other.*" *Virginian Ry. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 548; *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks, et al.* (1930), 281 U. S. 548.

The extent to which any union can bargain for the right to perform work is limited by the scope of its capacity as representative.³⁷ An employer can properly negotiate and enter into an agreement covering the right to perform certain work only with the true representative of the group whose craft line encompasses that particular work. Where one craft representative has successfully secured recognition and contractual rights to a given class of work, no agreement with a different representative or group of employes covering that same work would be valid. This restriction on the common law concept of freedom of contract, which is so vital to the national labor policy, does not impinge upon constitutional guarantees. *Virginian Ry. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 558-559.

In General Committee, B. L. E. v. M-K-T R. Co.

³⁷ A union has no right to demand and insist that an employer expand the bargaining unit to include additional work, *N. L. R. B. v. Local 19, International Bro. of Longshoremen* (CA-7, 1961), 286 F. 2d 661, cert. den. 368 U. S. 820; *U. S. Pipe and Foundry v. N. L. R. B.* (CA-5, 1962), 298 F. 2d 873, cert. den. 370 U. S. 919. Under both labor acts, conflicting individual contracts with employes who are represented collectively are not enforceable. *J. I. Case Co. v. Labor Board* (1944), 321 U. S. 332, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.* (1944), 321 U. S. 342.

(1943), 320 U. S. 323, the BLE, representing railroad engineers, brought a declaratory judgment action to declare void an agreement between the railroad and the BLF&E concerning the use of firemen as engineers in emergency service. BLE argued that it had the exclusive right to bargain with M-K-T with respect to work falling within that craft, engineers' work, and that the agreement with BLF&E was void. BLE's argument was summarized as follows:

" * * * Thus it is argued that the reasons which support the holding in the *Virginian Ry. Co.* case that the right of majority craft representation is exclusive also suggests that Congress intended to write into the Railway Labor Act a restriction on the rules and working condition concerning which the craft has the right to contract. It is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian Ry. Co.* case (300 U. S. p. 548) that the Act imposes upon the carrier 'the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' That expresses the basic philosophy of § 2, Ninth. * * *" (*Id.* at 335)

This Court ultimately held that the resolution as to which union had the right to contract for this work was not justiciable by a court,³⁸ but did not impair its prior recognition that under the Railway Labor Act only one

³⁸ Amicus RLEA's statement (RLEA Br. p. 6) that the decision below is in conflict with the General Committee, B. L. E. case is incorrect. In that case BLE sought a declaratory judgment that an agreement with BLF&E was in violation of the Railway Labor Act. This Court simply held such a dispute to be non-justiciable in the courts. The Adjustment Board was not mentioned. Moreover, the General Committee, B. L. E. case is cited in *Pitney*, 326 U. S. 561, 566, n. 3.

of those two competing unions had the right to contract for any particular work.

Under the Railway Labor Act, therefore, a railroad cannot enter into duplicating or "overlapping contracts" with respect to the same work. It can only properly and validly contract with the representative which is entitled to represent employees performing that particular type of work and no other. The suggestion that an employer might be equally bound under its contracts with both the competing unions has been and must be rejected as contrary to the national labor policy. *Labor Board v. Radio & Television Broadcast Engineers Union* (1960), 364 U. S. 573; *International Bro. of Carpenters v. C. J. Montag & Sons* (CA-9, 1964), 335 F. 2d 216, cert. den. 379 U. S. 99. *Amicus* RLEA has itself recognized that the "strict principles of commercial contract law and the common law of master and servant" are not appropriate guidelines in this area. Brief for RLEA as *Amicus Curiae*, p. 12, *Gunther v. San Diego & Arizona Eastern Ry. Co.*, decided December 8, 1965, 34 U. S. Law Week 4058. To the extent that it might be argued that the same work had been reserved in contracts of two different unions, one of those reservations would be valid and the other invalid. It is not a situation of "overlapping contracts."

RLEA argues that under the decision below a union's agreement would be "rewritten or modified" by the Adjustment Board (RLEA Br. p. 4). But the national labor policy as discussed above precludes a railroad from validly contracting the same work to two crafts. Plainly, the determination by the Adjustment Board as to which

craft has the right to the work is not to rewrite or modify a collective agreement any more than any interpretation of vague and ambiguous contractual provisions can be said to be rewriting or modifying a contract.

Both TCU and RLEA argue that the decision below conflicts with certain "indications" this Court made in *Whitehouse v. Illinois Central R. Co.* (1955), 349 U. S. 366.³⁹ This Court is supposed to have "indicated" that in a case like this BRC allegedly would in no way be affected by giving it notice of the Board proceedings. (Pet p. 17; RLEA Br. p. 6) *Whitehouse* involved an action by a railroad to enjoin the Board from proceeding on a claim of TCU on the grounds that BRC had not been given notice in that proceeding. The Supreme Court, while it raised many controversial questions, left them unanswered, resting its decision on the sole ground that the injunction action was premature. In that case, this Court was not concerned with an enforcement action and its dicta relied on by TCU and RLEA was clearly predicated upon the possibility that the Board might issue an award denying the claims adverse to the BRC and the railroad and would thus entail them no harm.

This same contention was made and rejected in *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry. Co.* (CA-8, 1956), 229 F. 2d 59, cert. den. 350 U. S. 997, where *Whitehouse* was found to be limited to a holding of prematurity and of no controlling effect in an enforcement action after an award had been rendered:

³⁹ Pet. pp. 16-17; RLEA Br. p. 6.

"* * * the Supreme Court chose to stay within 'the wise limitations on our function' and confined itself 'to deciding only what is necessary to the disposition of the immediate case.' It observed that 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it.' By divided Court it simply reversed the decree of injunction on the ground that prior to any proceedings brought by Telegraphers before the Board, 'the injuries are too speculative to warrant resort to extraordinary remedies.' The Court declined to adjudicate upon the merits of the controversy." (*Id.* at 66)

The limited and narrow scope of *Whitehouse* was recently reiterated in this Court's decision in *Carey v. Westinghouse Electric Corporation* (1964), 375 U.S. 261, 266.

In the *Carey* case, *supra*, IUE was certified to be the representative of all "production and maintenance" employees at one of respondent's plants. Another union (Federation) was certified to represent "salaried, technical" employees. IUE, proceeding under its contractual grievance procedure terminating with arbitration, claimed that production and maintenance work was being performed by employees represented by Federation. The question presented was whether the Court should force Westinghouse to proceed to arbitration with IUE with Federation absent from such proceeding. This Court held that the arbitration should proceed. IUE and Westinghouse had agreed upon arbitration and the possibility that such handling might end the dispute plus the national labor policy of encouraging arbitral handling were at the heart of this Court's decision. How-

ever, the decision was not reached without difficulty.⁴⁰

TCU relies on *Carey*, saying that the instant case is the same except that arbitration has taken place here, and TCU argues that because this Court ordered arbitration to proceed in *Carey*, the Adjustment Board award here can be "assumed to be valid and subject to enforcement even though the other union was not a party to the arbitration" (Pet. p. 19). We suggest this is a rather big assumption. In *Carey* it was recognized that "unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute." *Id.* at 265.⁴¹

While in this case the competitors are clerks and telegraphers, both subject to the jurisdiction of the Third Division of the Adjustment Board, *Amicus* RLEA argues that situations might arise where the competing employees were subject to the jurisdiction of two different divisions of the Board. (RLEA Br. p. 8) This presents no real problem and would seldom occur. The

⁴⁰ See the concurring opinion of Justice Harlan and the dissent of Justices Black and Clark, p. 273, as well as the majority opinion, pp. 265, 272.

⁴¹ Petitioner's reliance (Pet. p. 19) on *International Brotherhood of Firemen and Oilers v. International Association of Machinists* (CA-5, 1964), 338 F. 2d 176, affirming 234 F. Supp. 858, is less helpful. That case involved a work-assignment dispute between the Machinists and the Firemen and Oilers. The court simply enforced an arbitration award in favor of the Machinists made under the AFL-CIO "no-raiding agreement" in which both unions had participated and the employer had agreed that it would accept the court's decision. 338 F. 2d 176, 178. The court enforced the "no-raid" award notwithstanding the fact that it was contrary to a prior arbitration award in favor of the Firemen and Oilers in which the Machinists were not a party. (The "no-raiding" award which was enforced will be found in 35 Lab. Arb. 9. The prior award involving only Firemen and Oilers and the employer, Carling Brewing Company, is unreported but is described in 35 Lab. Arb. 9, 10 and 234 F. Supp. 858, 860.)

jurisdiction of the various divisions is based upon "a craft or job classification irrespective of the labor organization representing the particular employes involved." *Order of Railway Conductors v. Swan* (1947), 329 U. S. 520, 528. In any event, RLEA has itself decided that the Board should give "third party" notices "whether or not the rights of such third parties are subject to the jurisdiction of another division of the Board." (Appendix C, *infra*, p. 13a.) See *Seaboard Air Line R. R. v. Castle* (DC-Ill., 1958), 170 F. Supp. 327, 330.

Contrary to the hypothetical predictions made by *Amicus* (RLEA Br. p. 9), the decision below presents no threat to the "effectiveness" of the Adjustment Board nor does it "pervert" the latter's functions. The court below recognized, as did the Court of Appeals for the Ninth Circuit in *International Brotherhood of Carpenters v. C. J. Montag & Sons* (CA-9, 1964), 335 F. 2d 216, that:

"* * * A jurisdictional dispute is not 'determined' by attempting to muffle it by a decision which embodies the evils of duplication and featherbedding at the expense of the employer, which Congress sought to eliminate." (*Id.* at 222)

Instead, under the holding of the court below the Adjustment Board will meet the responsibilities of its primary jurisdiction and resolve these jurisdictional work-assignment disputes in accordance with congressional intent and this Court's decisions.

2. The Enforcement Action was Properly Dismissed Because of the Absence of an Indispensable Party.

The alternative holding of the court of appeals below affirming the dismissal because of the absence of an indispensable party was sound and correct. It is in accord with *Order of Railroad Telegraphers v. New Orleans T. & M. Ry.* (CA-8, 1956), 229 F. 2d 59, cert. den. 350 U. S. 997, and furnishes an additional basis for denying certiorari.

The district court found that BRC was indispensable to the action since the enforcement of Award 9988 would give to telegraph employees work now being performed by clerical employees.⁴² It cited and quoted from *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S.S. Clerks* (CA-7, 1951), 188 F. 2d 302 (R. pp. 12-13):

“* * * We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees.” (*Id.* at 306)

It may be contended that the decisions below were premised on the assumption that in an enforcement action there would be a trial *de novo* of the merits of the dispute (R. p. 14; Pet. p. 15a) Since the decision below was rendered, this Court in *Gunther v. San Diego & Arizona Eastern Ry.* (U. S. December 8, 1965),

⁴² On appeal, contrary to its position in the district court, TCU denied it was seeking anything other than money damages. However, this is of no moment to the indispensability question. *Allain v. Tummon* (CA-7, 1954), 212 F. 2d 32, 36.

34 U. S. Law Week 4058, has held that a district court could not "review an Adjustment Board's determination on the merits of a grievance" in an action to enforce an award ordering the reinstatement of an employee. TCU may contend that in *Gunther* this Court has rejected *de novo* review of all awards of the Adjustment Board. The scope and extent of this Court's decision in *Gunther* and whether it would be applicable to an enforcement action involving an award in a work-assignment dispute may not now be entirely clear. Nevertheless, this case does not present such questions because apart from any *de novo* review questions, there remain valid and compelling reasons which require that BRC have been made a party to this enforcement action.

There is, of course, in any enforcement action the "crucial question" as to whether the award sought to be enforced was validly made. See *Elgin, J. & E. Ry. Co. v. Burley* (1945), 325 U. S. 711, 720. In this consideration, a serious problem is posed because of the directly contrary prior award of the Adjustment Board. In Award 8656, it was held that the performance of the work by clerical employees did not violate TCU's agreement. Under Section 3, First (m) of the Act,⁴³ the decision in Award 8656, favoring the BRC, was "final and binding" on TCU. BRC thus has a real interest in any enforcement of the subsequent contrary Award 9988 which would be substantially affected and is thus indispensable to the enforcement action. *Shield v. Barrow* (1854), 21 U. S. 409, 17 How. 130, 139. *Order of Rail-*

⁴³ 45 U. S. C. § 153, First (m).

road Telegraphers v. New Orleans, T. & M. Ry. (CA-8, 1956), 229 F. 2d 59, 67, cert. den. 350 U.S. 997. *Green v. Brophy* (CA-DC, 1940), 110 F. 2d 539.

There are other matters which the District Court must inquire into in an enforcement action even though it does not review the merits of the dispute, e. g., the Board's jurisdiction, the adequacy of the notice served on BRC (R. p. 7), and the effect of BRC's letter to the Board (R. p. 8).⁴⁴

In *Brotherhood of Railroad Trainmen v. Swan* (CA-7, 1954), 214 F. 2d 56, it was held that an employe or group of employes whose work was being claimed by another group in a proceeding before the Board —

“ * * * will be entitled to be present at all hearings in these matters, introduce evidence, cross-examine all witnesses heretofore or hereafter produced by parties with opposing interests, and make arguments. They have a substantial right to be heard on all matters which materially affect their interests. * * * ”
(*Id.* at 59)

The right of parties performing the work to participate in proceedings in which a competing union claims the same right to the same work has been held to reach constitutional due process requirements. *Hunter v. Atchison, T. & S. F. Ry. Co.* (CA-7, 1948), 171 F.

⁴⁴ In the courts below, TCU argued that the BRC letter was a specific disclaimer of “any interest in the dispute” and that by declining to participate in the Adjustment Board proceedings on this claim, BRC has in effect indicated its disinterest and waived any future rights to the work. The determination of this issue itself is a matter in which BRC would clearly have an “interest” which could be directly affected by the enforcement proceeding.

2d 594; *Allain v. Tummon* (CA-7, 1954), 212 F. 2d 32, 37; *Griffin v. Chicago Union Station* (DC-ND, Ill., 1936), 13 F. Supp. 722, 724. Similarly, the railroad has a reciprocal right that such participation be extended to all parties who would be affected by the decision in order to assure that any such decision would be *res judicata* and binding upon all such parties. *Allain v. Tummon, supra*, at p. 36; *Kirby v. Pennsylvania R. Co.* (CA-3, 1951), 188 F. 2d 793, 799; and such right is also protected by constitutional guarantees, *M-K-T R. Co. v. N. R. A. B.* (DC-ND Ill., 1954), 128 F. Supp. 331, 369.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

F. J. Melia

H. Lustgarten, Jr.

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*Counsel for Respondent, Union
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January, 1966.

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APPENDIX A**Relevant Statutory Provisions**

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 1185), 45 U. S. C., ch. 8; U. S. C. A., Title 45 secs. 151-164.

Section 151a:

"GENERAL PURPOSES

"The purposes of the chapter are:

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 152:

"GENERAL DUTIES

• • • • •

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or

carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

* * * * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees

reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * * *

“Ninth. If any dispute shall arise among a carrier’s employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * *

* * * * *

Section 153, First:

“There is hereby established a Board, to be known as the ‘National Railroad Adjustment Board’, the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

“(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as

have been or may be organized in accordance with the provisions of section 2 of this Act.

* * * *

“(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * *

“(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

“First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

“Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

“Third division: To have jurisdiction over dis-

putes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

“Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

“(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner, up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

“(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

• • • • •

“(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as ‘referee,’ to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

“(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

“(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

.

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in

the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

.

“(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes,

and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.'"

Labor Management Relations Act (Pub. No. 101, 80th Cong., appd. June 23, 1947, 49 Stat. 136), 45 U. S. C., ch. 7; U. S. C. A., Tit. 29, secs. 151-168.

Section 10(k):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

APPENDIX B

Excerpts from Findings of Fact entered by the United States District Court, Northern District of Illinois, Eastern Division in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, Civil Action No. 50 C 684, reported at 128 F. Supp. 331:

"64. ORT regained its place on the Board in 1949, after subscribing to BRC's program for Board

procedure and joining BRC and other labor organizations in the following agreement:

'The Chief Executives of the organizations which take cases to the Third Division agreed that any disputes brought to that Division would be supported by the Labor representatives on that Division, provided the provisions of the agreement of the organization submitting the claim did sustain the position taken by the organization. It was further agreed that in the event the application of a sustaining award would result in a violation of the rules of another agreement, the second organization could also bring a claim to the Third Division to correct such violation and in the event the rules of the agreement involved supported the claim all of the Labor Members of the Board would support that claim. In other words the decisions of the Labor Members on the Board would be based upon the rules in the agreement of the Organization bringing the claim and they would vote to sustain the claim if supported by the rules of the agreement involved or to deny the claim if not supported by the rules of the agreement involved which is the intent and purpose of the Railway Labor Act.'

"This was the same procedural program previously advocated by the BRC and which the labor members of the Board followed from July, 1942 to September, 1949, during which period there was no ORT representative on the Board.

.

"156. In disputes such as those involved in Awards 3932, 3933, 3934, 4735, and 5014, it is the settled custom and practice of the Board:

"(a) Not to give notice of the filing of a claim to anyone except the claimant and the railroad named in the claim.

"(b) Not to permit anyone, except the claimant and the railroad named in the claim, to file papers or other documents with the Board.

"(c) Not to give notice of hearing to anyone except the claimant and the railroad named in the claim.

"(d) Not to permit anyone, except those to whom the Board has given notice, to be present at the hearing or to participate in the hearing.

"(e) Not to permit anyone to intervene.

"(f) Not to recognize anyone as a party to a proceeding except the claimant and the railroad named in the claim, and not to make anyone else a party to a proceeding, even when requested to do so.

"157. The settled custom and practice of the Board, described in Finding 156, is caused by the position of the labor members of the Board that only the claimant and the railroad named by the claimant should be given notice and an opportunity to be heard.

"158. The position of the labor members of the Board, described in Finding 157, is the result of a policy fixed by agreement between the chief executives of the railroad labor organizations who comprise the Railway Labor Executives Association and who select, control and discipline the labor members of the Board.

"159. The carrier members of the Board are opposed to its settled custom and practice described in Finding 156. It is their position that the Board should give notice and an opportunity to be heard to all employees and labor organizations involved in disputes submitted to the Board.

"160. The conflicting positions of the labor members and of the carrier members of the Board

make it impossible for the Board to decide the issue as to notice and hearing without the aid of referees.

"161. Referees appointed to break deadlocks as to notice and hearing are divided in their opinions. Some agree with the position of the labor members of the Board and render awards on the merits without giving notice and opportunity to be heard; others agree with the position of the carrier members of the Board but render awards dismissing the claims, without prejudice, instead of ordering that notice and hearing be given.

"162. These divergent views and actions of the Board members and the referees, described in Findings 158 to 161, have produced an administrative deadlock, stalemate and frustration on the Board. The carrier members have asked for judicial guidance."

Note: The letters "ORT" in the foregoing referred to The Order of Railroad Telegraphers now changed to Transportation-Communication Employees Union. The letters "BRC" referred to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

APPENDIX C

Policy Declaration of Railway Labor Executives' Association and excerpt from Answer to Interrogatory No. 1, in *The Order of Railroad Telegraphers v. Southern Pacific Company*, No. Civ. 4812-Phx, pending in the U. S. District Court for the District of Arizona.

"Following the decision of the Supreme Court in March 1956, refusing to grant certiorari in the case of *O. R. T. v. N. O. T. & M. Ry. Co.*, 350 U.S. 997, the Organizations whose Chief Executives were affiliated with the Railway Labor Executives' Association decided to review their policy position that neither the

Railway Labor Act nor the Constitution of the United States required the divisions of the National Railroad Adjustment Board to serve third party notices.

"In June 1959, the Chief Executives affiliated with the Railway Labor Executives' Association agreed to a Policy Declaration that they would no longer oppose the issuance of third party notices by the divisions of the National Railroad Adjustment Board, and that each Organization receiving a third party notice would reply to such notice in substantially the same manner set forth in a proposed letter attached to the Policy Declaration. A copy of the Policy Declaration with attachment is attached hereto as Exhibit 1."

Policy Declaration Agreed Upon by Chief Executives Affiliated with Railway Labor Executives' Association

The standard Railway Labor Organizations have consistently taken the position that neither the Railway Labor Act nor the Constitution of the United States require the National Railroad Adjustment Board to serve a so-called "third party notice" except in a few isolated instances. The carrier and the carrier members of the Adjustment Board have just as consistently maintained that such notices must be given in all cases where a decision of the Board may conflict with any alleged claim or interest of an employee or labor organization not initially a party to the Board's proceedings.

The lower courts for the most part, have rejected the contention of the labor organizations even in those cases where the alleged third party interest is subject to the jurisdiction of a different division of the Board and the Railway Labor Executives' Association has been unable to obtain a review of these decisions by the United States Supreme Court.

The members of the Railway Labor Executives' Association have agreed that continued opposition to the issuance of the third party notice would be futile and costly

whether or not it involves employees whose rights are subject to the same or different divisions of the Board. It has also been agreed that by abandoning our opposition to the granting of a third party notice, the affiliated organizations are not receding from their position that the Board is without authority to adjudicate any rights of any such third party which arises under an agreement different from the one the interpretation or application of which is sought in the initial submission to the Board. In other words, we are maintaining our position that the Board is not empowered to reconcile conflicting agreements or render any decision which will conflict with the rights of such third parties or their representatives to have the collective bargaining agreements interpreted and applied in proceedings initiated by them.

For the purpose of implementing this policy, all affiliated organizations have agreed as follows:

- (a) That third party notices should be issued by all divisions of the Adjustment Board in each case where the carrier members of the Board requests it and in any other case in which the submissions of the parties disclose the existence of an interest in third parties whether or not the rights of such third parties are subject to the jurisdiction of another division of the Board, and
- (b) That each organization receiving a third party notice shall reply to such notice substantially in the manner set forth in a proposed letter which is attached hereto as Exhibit A and shall not otherwise appear or participate in the proceeding.

The foregoing procedure was adopted to expedite the handling of third party notice cases and to avoid litigation which appears to have little hope of success in view of the precedents already established.

Exhibit A

Executive Secretary
National Railroad Adjustment Board

Division
220 South State Street
Chicago 4, Illinois

Dear Mr. _____ :

I acknowledge receipt of your letter of _____ giving notice of the pendency of the following dispute before the _____ Division, National Railroad Adjustment Board:

(Quote description of claim as stated in notice)

You advise that said dispute bearing Docket No. _____ will be heard at _____, on _____, at the headquarters of the _____ Division of the National Railroad Adjustment Board, Room _____, Consumers Building, 220 South State Street, Chicago, Illinois.

From the description of the dispute set forth in your letter, it would appear that this is a dispute between the (Carrier) on the one hand and the (petitioning organization) on the other hand involving the interpretation or application of the agreement between them covering the rates of pay, rules and working conditions of employees represented by (petitioning organization). If this understanding is not correct, I would appreciate being further advised.

If my understanding of the nature of the dispute, as set forth in the preceding paragraph, is correct, please be advised that neither the (organization) nor the employees it represents are involved in such a dispute between a carrier and the representative of another craft concerning the interpretation of its agreements between the carrier

and the representative of such other craft. The rights of employees represented by the (organization) are predicated upon agreements between the carriers and our organization. If, at any time, and for any reason, a carrier party to an agreement with our organization should undertake to assign work covered by such agreement to employees not covered thereby, we shall, of course, take appropriate steps pursuant to the provisions of the Railway Labor Act to correct any such violation of our agreement and to protect the employees we represent against any loss resulting from any such violation.

Very truly yours,

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
Summary of Argument	8
Argument	10
I. The Court Below Erred in Determining that TCU's Claim Involved a Jurisdictional Dispute Determinable by the Adjustment Board	11
II. Even if TCU's Claim Before the Adjustment Board Did Involve a Jurisdictional Dispute the Adjustment Board was Correct in Determining TCU's Claim Without Determining the Rights of Employees Represented by BRC	16
A. The decision of the Court below is contrary to the provisions of the Railway Labor Act ..	16
1. The jurisdiction of the Adjustment Board is limited to determining disputes between employees and carriers which are the sub- ject of claims filed with it	16
2. Other provisions of Section 3 of the Rail- way Labor Act show that Congress did not intend the Adjustment Board to determine jurisdictional disputes	19
B. The decision of the Court below is not sup- ported by decisions of this Court; to the extent that this Court has considered the issue herein, the conclusions reached by this Court are contrary to the decision of the Court below	27
Conclusion	37

TABLE OF CITATIONS

CASES:	Page
Allain v. Tummon, 212 F. 2d 32 (7th Cir. 1954)	22
Bro. of Railroad Trainmen v. Templeton, 181 F. 2d 527 (8th Cir. 1950)	20, 22
Carey v. Westinghouse, 375 U.S. 261 (1964)	11, 31, 33
Gunther v. San Diego & Arizona Eastern Ry., 382 U.S. 257 (1965)	33, 34
Hunter v. Atchison, Topeka & Santa Fe Ry., 171 F. 2d 594 (7th Cir. 1948)	20
International Bro. of Firemen and Oilers v. Inter- national Assn. of Machinists, 338 F. 2d 176 (5th Cir. 1964)	33
N.L.R.B. v. Radio and Television Broadcast Engineers Union (Columbia Broadcasting System), 364 U.S. 573 (1961)	17, 24, 25
Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946)	7, 27, 29
Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 61 F. Supp. 869, 156 F. 2d 1, cert. den. 329 U.S. 758, reh. den. 329 U.S. 829	13
Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F. 2d 59 (8th Cir. 1956)	13, 14, 15, 23
Order of R.R. Telegraphers v. Union Pacific R.R., 59 LRRM 2993 (10th Cir. 1965)	5, 6
Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950)	7, 27, 29
Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937)	35
Washington Terminal Co. v. Boswell, 124 F. 2d 235 (D.C. Cir. 1941)	36
Whitehouse v. Illinois Central R.R., 349 U.S. 366 (1955)	9, 23, 29-31, 36
STATUTES:	
Judiciary Code 28 U.S.C. § 1254(1)	2
National Labor Relations Act, 29 U.S.C. 151-168, 61 Stat. 136:	
Section 10 (k)	9, 23, 25, 26, 32
Public Law 89-456, 80 Stat. 208	33, 34
Railway Labor Act, 45 U.S.C. 151-164, 48 Stat. 1185:	
Section 2, Ninth	35
Section 3, First (a)	20

Index Continued

iii

	Page
Section 3, First (h)	19
Section 3, First (i)	3, 9, 16-18, 23, 25, 26
Section 3, First (j)	22, 23
Section 3, First (l)	21
Section 3, First (n)	21
Section 3, First (p)	4

MISCELLANEOUS:

Lodge No. 1743, IAM and Jones Construction Co., 135 NLRB 1402 (1962)	25
National Railroad Adjustment Board, Third Division, Awards Nos. 3999, 4471, 8217	20
29 Code of Federal Regulations	18, 28
Kroner, Minor Disputes Under the Railway Labor Act, 37 NYU Law Review 41 (1962)	23

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PAGE

IN THE
Supreme Court of the United States
OCTOBER TERM, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Tenth Circuit was not officially reported; it is unofficially reported at 59 LRRM 2993. The second opinion of the Court of Appeals is officially reported at 349 F. 2d 408 and is unofficially reported at

60 LRRM 2244; it is reprinted at R. 90-96. The opinion of the District Court is reported at 231 F. Supp. 33 and is unofficially reported at 56 LRRM 2815; it is reprinted at R. 78-85.

JURISDICTION

The original judgment of the Court of Appeals was entered on July 22, 1965. On October 8, 1965, the Court of Appeals vacated that judgment and substituted a new judgment. (R. 97) The original petition for certiorari was filed on October 7, 1965; on December 13, 1965, a supplemental petition for certiorari was filed. This Court granted the petition on February 21, 1966. (R. 98) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Railroad Adjustment Board may determine a dispute arising from a claim that a railroad has failed to assign work as required by a collective bargaining agreement without a determination of the rights of other employees represented by another union to whom the work was assigned, where the other union was given notice of the proceeding before the Adjustment Board and declined to participate, and has not filed a claim with the Adjustment Board?

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act, as amended (48 Stat. 1185, 45 U.S.C. Secs. 151-164), and the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151-168) are set forth in the Appendix, *infra*.

STATEMENT OF THE CASE

This action was brought by the Transportation-Communication Employees Union (formerly "The Order of Railroad Telegraphers" and herein referred to as "TCU") against the Union Pacific Railroad Company (herein referred to as the "Carrier") to enforce an Award and Order of the National Railroad Adjustment Board, Third Division (herein referred to as the "Adjustment Board"). (R. 1-4)

The TCU, as the duly authorized and designated representative under the Railway Labor Act of the crafts or classes of employees commonly known as station, tower, and telegraph employees (R. 1-2), filed a claim with the Carrier that the Carrier had violated the collective bargaining agreement between the parties by not assigning the operation of certain machines in the Carrier's yard office in Las Vegas, Nevada, to employees represented by TCU. The Carrier had assigned the work to employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (herein referred to as "BRC"). (R. 91)

The dispute was not settled by the parties on the property and thereafter TCU referred the dispute to the Adjustment Board. Section 3, First (i), 45 U.S.C. § 153, First (i)). TCU's request for relief was (R. 5):

"(c) that for such violations the Carrier shall compensate the senior idle employe or employes covered by the Telegrapher's Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location."

The Adjustment Board notified BRC of the pendency of the proceedings, the date set for the hearing, and that BRC would be permitted to appear and participate. (R. 75) The BRC's reply to the Adjustment Board was that the controversy before the Adjustment Board concerned a dispute between the Carrier and TCU over an interpretation of the agreement between those two parties involving employees represented by TCU, that employees represented by BRC were not involved in that dispute, and that it would not participate in the proceedings before the Adjustment Board. (R. 76-77)

The Adjustment Board thereafter considered the merits of TCU's claim and on July 14, 1961, issued Award No. 9988 and an accompanying Order sustaining TCU's claim and directing the Carrier to make the Award effective. (R. 5-71) The Carrier refused to comply with the Award and Order of the Adjustment Board, whereupon this enforcement action was brought, pursuant to Section 3, First (p) of the Railway Labor Act (45 U.S.C. § 153 First (p)).

On September 13, 1963, the Carrier filed a motion to dismiss TCU's complaint setting forth three grounds (R. 72), the first two of which were denied by the District Court. (R. 78) The substance of the third ground for dismissal, which was granted by the District Court, was that TCU had failed to name an indispensable party, namely BRC, to the enforcement action. The District Court dismissed the complaint with leave for TCU to file, within 30 days of the Order, an amended complaint making BRC a party to the action. (R. 85) TCU did not make BRC a party and on September 30, 1964, the District Court granted the Carrier's motion and entered a final judgment of dismissal

dismissing the complaint for failure to make BRC a party. (R. 87-88) An appeal was taken by TCU from the final judgment of the District Court to the Court of Appeals for the Tenth Circuit. (R. 88)

On July 22, 1965, the Court of Appeals issued an opinion and judgment in which the Court did not pass on the sole question presented before it, to-wit, whether BRC was an indispensable party to the enforcement action, but instead vacated and set aside the Order of the Adjustment Board, and remanded the case to the District Court with instructions to remand it to the Adjustment Board for further proceedings. *The Order of R.R. Telegraphers v. Union Pacific R.R.*, 59 LRRM 2993 (10th Cir. 1965) (not officially reported).

The Court of Appeals held that the dispute before the Adjustment Board involved a jurisdictional dispute between TCU and BRC concerning a question of which group of employees was entitled to perform certain work, that BRC "for all practical purposes" became "parties" to the Adjustment Board proceeding, and that the Adjustment Board was required to exercise its jurisdiction "over the whole dispute at one time." 59 LRRM at 2996. The Court remanded the case for further proceedings in accordance with its opinion.

On or about September 16, 1965, the Carrier filed with the Court of Appeals a motion requesting leave to file a petition for rehearing out of time, and a petition for rehearing, concerning the part of the Court's judgment which directed that the case be remanded to the Adjustment Board for further proceedings.

On October 7, 1965, TCU filed with this Court a petition for certiorari to review the part of the judgment of

the Court of Appeals vacating and setting aside the Order of the Adjustment Board.

The following day, on October 8, 1965, without acting on the motion of the Carrier for rehearing, the Court of Appeals withdrew its opinion and judgment entered on July 22, 1965, and in their place entered a new opinion and judgment. (R. 90-97) The latter judgment affirmed the disposition of the case by the District Court, namely, a dismissal of the complaint. There was no direction, as there had been in the first judgment, that the case be remanded to the Adjustment Board for further proceedings.

Although the first judgment of the Court of Appeals reversed the District Court and the second judgment affirmed the lower Court, the holding of the Court of Appeals was the same to the extent of declaring the Order of the Adjustment Board void and unenforceable. The Court's rationale also remained the same. The two opinions are virtually identical except for the final two paragraphs. In its initial opinion, in keeping with its decision that the Order of the Adjustment Board was unenforceable and that the case be remanded to the Adjustment Board, the Court of Appeals concluded (*The Order of R.R. Telegraphers v. Union Pacific R.R.*, 59 LRRM 2993 at 2996):

"Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practices, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. . . . When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order."

In its second opinion, consistent with its decision that the Order of the Adjustment Board was unenforceable and that the case not be remanded to the Adjustment Board, the Court concluded (R. 96):

"The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. A complete hearing would include all issues, practices, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make an initial determination, if petitioned to act, before a court can act on a complete proceeding should it be requested to do so. *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239; *Order of Railway Conductors v. Pitney*, 326 U.S. 561.

"The District Court dismissed the appellant's petition for failure to join an indispensable party—the Clerks. Had these parties been joined and appeared presumably the matters relating to their position and contract could have been presented to the court thereby filling the same void we find to exist. Our difference with the District Court is only in that the Board should under the doctrine of primary jurisdiction have the first opportunity to consider the entire controversy including the Clerks' contract."

On December 13, 1965, TCU filed a Motion for Leave to File a Supplemental Petition, and a Supplemental Petition for a Writ of Certiorari to review the last judgment of the Court of Appeals, and on February 21, 1966, the petition was granted. (R. 98)

SUMMARY OF ARGUMENT

The determination of the Court below, that TCU's claim before the Adjustment Board created a jurisdictional dispute and the Award and Order of the Adjustment Board was unenforceable because the Adjustment Board failed to determine the rights of employees represented by BRC, is erroneous for several reasons.

Initially, the Court of Appeals erred in finding that TCU's claim before the Adjustment Board raised a jurisdictional dispute between employees represented by TCU and employees represented by BRC concerning which group of employees was entitled to the assignment of particular work. TCU's claim concerned a breach of the collective bargaining agreement between the Carrier and TCU. The relief requested by TCU, and granted by the Adjustment Board, was the award of money damages to employees represented by TCU because of the breach of the agreement. TCU did not seek an award that employees represented by BRC are not entitled to perform the work, nor does the Award and Order of the Adjustment Board in this case mandate such result. Since the rights of employees represented by BRC are derived solely from the collective bargaining agreement between the Carrier and BRC, their rights could not be affected by the agreement between the Carrier and TCU, nor could they be affected by the determination of the Adjustment Board of the rights of TCU employees under their agreement with the Carrier. Accordingly, there was no reason to determine the rights of employees represented by BRC when no dispute existed between BRC and the Carrier concerning such rights arising from their agreement.

Furthermore, assuming that TCU's claim did involve a jurisdictional dispute between TCU and BRC, the

Adjustment Board does not have jurisdiction to determine such aspect of the dispute. The Court of Appeals' ruling to the contrary is at variance with the plain language of Section 3, First (i) of the Railway Labor Act which sets forth the jurisdiction of the Adjustment Board as limited to disputes between employees and employers over the application or interpretation of collective bargaining agreements.

In addition, other provisions of Section 3 of the Railway Labor Act make it clear that Congress did not intend the Adjustment Board to resolve jurisdictional disputes. This is made even clearer by comparing provisions of the Railway Labor Act with Section 10(k) of the National Labor Relations Act which specifically empowers the National Labor Relations Board to "hear and determine" jurisdictional disputes.

The decisions of this Court relied upon by the Court of Appeals are not dispositive of the issue. We know of no case in which this Court has ruled on the issue of whether the Adjustment Board has jurisdiction to determine, and is required to determine, jurisdictional disputes. To the extent that this Court has considered the issue in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), however, the conclusions drawn by the Court in that case are diametrically opposed to the conclusion of the Court of Appeals.

ARGUMENT

The Court of Appeals viewed this case as involving a jurisdictional dispute between two groups of employees, one represented by TCU and the other represented by BRC, as to which group is entitled to perform certain work. The Court was of the opinion that although the claim before the Adjustment Board pertained only to an alleged violation of an agreement

between TCU and the Carrier, with TCU seeking damages for the alleged breach of such agreement, the nature of the claim resulted in BRC "for all practical purposes" (R. 96) becoming a party to the administrative proceedings and required the Adjustment Board to exercise authority "over the whole dispute at one time" (R. 95) and to adjudicate the rights of the employees represented by BRC as well as those represented by TCU—a ruling not urged by any of the parties, either before the Adjustment Board or in the Courts below.

The Court of Appeals concluded that the prior proceeding before the Adjustment Board was incomplete because it did not dispose of "all issues, practices, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties." (R. 96)

Thus, the Court below determined that TCU's claim involved a dispute over an assignment of work, and the Adjustment Board had jurisdiction to determine and was required to determine, not whether the Carrier had breached its agreement with TCU but which group of employees was entitled to perform the work involved herein.

The Court of Appeals was in error on two grounds. First, the Court erred in finding that TCU's claim before the Adjustment Board involved a jurisdictional dispute. Second, to the extent that TCU's claim did involve a jurisdictional dispute, the Court erred in holding that the Adjustment Board had jurisdiction to determine and was required to determine that aspect of TCU's claim.

The first ground is discussed in part I of this brief and the second ground is discussed in part II.

I. THE COURT BELOW ERRED IN DETERMINING THAT TCU'S CLAIM INVOLVED A JURISDICTIONAL DISPUTE DETERMINABLE BY THE ADJUSTMENT BOARD.

The term "jurisdictional dispute" was defined by this Court in *Carey v. Westinghouse*, 375 U.S. 261 (1964) at 263, as a dispute:

"... involving two unions and the employer ... as to whether certain work should be performed by workers in one bargaining unit or those in another."

Inherent in such dispute is the proposition that only one of two groups of competing employees has a right to perform the work in dispute and that a determination that one group of employees is entitled to perform the work must necessarily determine that the other group of employees does not have the right to perform the work.

The dispute in this case does not fit within the definition of a jurisdictional dispute. TCU's claim before the Adjustment Board was that the Carrier had violated their collective bargaining agreement by not assigning certain work to employees represented by TCU as required by the agreement. (R. 5) The claim asked an adjudication that employees represented by TCU were entitled to do the work on the basis of the collective bargaining agreement between the parties which gave the employees it represents the right to perform such work.

The relief requested was that the Carrier compensate employees represented by TCU who would have performed the work had the Carrier complied with the

agreement. (R. 5). The relief sought by TCU was not that employees represented by BRC were not entitled to perform the work in dispute and that such employees should be dispossessed of such work. It is clear that an agreement between the Carrier and TCU setting the terms and conditions of employment of employees represented by TCU could not determine the rights of employees represented by BRC under the BRC agreement.

This obvious fact was recognized by BRC and formed the basis of its declination to participate in the Adjustment Board's proceedings with respect to TCU's claim. (R. 76-77) As pointed out by BRC, the dispute pending before the Adjustment Board concerned an interpretation and application of the agreement between the Carrier and TCU with which BRC was not involved. BRC would have no claim against the Carrier unless and until the Carrier took some action which BRC considered as constituting a violation of the Carrier's agreement with BRC, and at such time, BRC's remedy would be to file a claim and, if not adjusted in conference, progress it to the Adjustment Board alleging such violation.

Thus the determination by the Adjustment Board that employees represented by TCU are entitled to perform the work meant no more than that the work involved was within the scope of the collective bargaining agreement between those parties. It did not mean that such work *could not* be included within the scope of some other agreement between the Carrier and another union representing a different group of employees. Such a determination is a far cry from what is termed a "jurisdictional dispute"; it is simply a dispute over the meaning of an agreement.


Actually the present case is even farther removed from a "jurisdictional dispute" than the preceding discussion indicates since TCU's claim in this case did not seek an assignment of the work but merely money damages for breach of the agreement. Thus, the Adjustment Board's Award merely required the Carrier to (R. 5):

"compensate the senior idle employee or employees covered by the Telegraphers' Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location."

The Court of Appeals for the Eighth Circuit, in *Order of R.R. Telegraphers v. New Orleans T. & M. Ry.*, 229 F. 2d 59 (1956), has expressed its view that the relief sought before the Adjustment Board, in disputes similar to that involved in this case, is of importance in determining whether the presence of other parties before the Adjustment Board and the court is required.

In that case, the facts underlying the dispute were as follows. In 1943 the BRC obtained an award and order from the Adjustment Board sustaining its claim that employees represented by the BRC were entitled to the assignment of certain work. TCU attempted to intervene in the Adjustment Board proceeding but was refused intervention by the Adjustment Board. TCU was likewise unsuccessful in an action brought in the district court to have the Adjustment Board's award and order declared unenforceable. *Order of Railroad Telegraphers v. New Orleans T. & M. Ry.*, 61 F. Supp. 869, 156 F. 2d 1, cert. den. 329 U.S. 758, reh. den. 329 U.S. 829.

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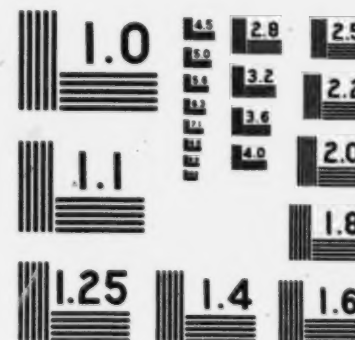
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Pursuant to the award the carrier replaced employees represented by TCU with employees represented by BRC. Thereafter, TCU filed a claim with the Adjustment Board claiming that employees it represented were entitled to perform the same work. The remedy sought by TCU and granted by the Adjustment Board was that "all employees adversely affected by these violative acts of the carrier shall be restored to their former positions. . ." *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F. 2d 59, footnote 1.

The carrier refused to comply with the award and order of the Adjustment Board and TCU brought suit for enforcement. The carrier's contention, sustained by the district court, was that the award was unenforceable because, *inter alia*, BRC had not been given notice of the proceedings before the Adjustment Board (229 F. 2d 59, footnote 2). The district court's conclusions of law, adopted by the Court of Appeals, were set forth in the Court of Appeals' opinion (229 F. 2d at 64). The first paragraph of those conclusions, pertinent to the present discussion, was as follows:

"1. The intent and purpose of former Award No. 2254 in favor of the Clerks was to give the disputed clerical work . . . to members of the Clerks' organization. The intent and purpose of the subsequent Award No. 4734 of the same division of the Adjustment Board now under consideration was to give the same disputed clerical work . . . to the members of the Telegraphers' organization. *Both organizations claimed the work in controversy and not merely pay for the work performed.*

"... To now give the disputed clerical work to the Telegraphers . . . *will of necessity take that work away from a member of the Clerks' organization who is now performing the clerical work.*

... The controversy now before the Court therefore involves conflicting claims of the Clerks and Telegraphers to the same clerical work." (Emphasis added.)

The district court specifically declined to pass on the carrier's additional contention that BRC was an indispensable party to the enforcement action. The Court of Appeals affirmed the district court's holding and added that the complaint should be dismissed also because the BRC had not been made a party to the enforcement action. The Court reasoned (229 F. 2d at 67):

"Enforcement of Award No. 4734 prayed for in the plaintiff's complaint in this suit would necessarily include the issuance by the Federal Court of a mandate requiring the defendant carrier to dispossess a clerk now in its employ of his job. The Clerks' claim of right to the job has been determined by an Award of the Board and his interest in the suit to dispossess him of it is real and obvious." (Emphasis added.)

Although we do not agree with the conclusion of those courts that under the factual circumstances of the *N. O. T. & M.* case the BRC was required to be given notice of the proceedings before the Adjustment Board and would be an indispensable party to the enforcement action, it is clear that the courts distinguished the factual situations in that case from situations such as presented herein.

In the present case, the relief sought and granted by the Adjustment Board would not require "the issuance by the Federal Court of a mandate requiring the defendant carrier to disposses a clerk now in its employ of his job." Unlike the *N. O. T. & M.* case in which

"both organizations claimed the clerical work in controversy and not merely pay for the work performed," in the present case only TCU has filed a claim and such claim seeks relief only in the form of monetary compensation and not an assignment of the work.

II. EVEN IF TCU'S CLAIM BEFORE THE ADJUSTMENT BOARD DID INVOLVE A JURISDICTIONAL DISPUTE THE ADJUSTMENT BOARD WAS CORRECT IN DETERMINING TCU'S CLAIM WITHOUT DETERMINING THE RIGHTS OF EMPLOYEES REPRESENTED BY BRC.

The Court of Appeals held that the Adjustment Board could not determine the dispute arising from a claim that the Carrier had assigned work in violation of a collective bargaining agreement between it and TCU without a determination of the rights of employees represented by BRC to whom the work was assigned, even though BRC was given notice of the proceedings before the Adjustment Board and declined to participate, and even though neither BRC nor the Carrier had filed a claim with the Adjustment Board concerning the meaning of their agreement.

Neither the provisions of the Railway Labor Act nor cases construing the Act support the holding of the Court below.

A. The Decision of the Court Below Is Contrary to the Provisions of the Railway Labor Act

1. The jurisdiction of the Adjustment Board is limited to determining disputes between employees and carriers which are the subject of claims filed with it

The jurisdiction of the Adjustment Board is set forth in Section 3, First (i) of the Railway Labor Act (45 U.S.C. § 153, First (i)), and is confined to:

"... disputes between an employee or group of employees and a carrier or carriers growing out of

grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions”

There is no provision in the Act authorizing a union to file a claim with the Adjustment Board that it is entitled to the assignment of work except in the form of a claim that a carrier breached an agreement by not assigning the work in question to employees it represents.

Notwithstanding the absence of such provision, however, the Court of Appeals would have the Adjustment Board assert jurisdiction to determine the rights of employees represented by the BRC, which has not filed a claim with the Adjustment Board concerning the work involved in TCU's claim, and indeed, has no dispute at all with the Carrier concerning the work.

To sustain the holding of the Court of Appeals would require a finding that the Adjustment Board has the power to create a dispute where none exists, and to determine the rights of employees under an agreement when both parties to the agreement concur as to its interpretation and application and have not requested the Adjustment Board to intrude.

Furthermore, the jurisdiction of the Adjustment Board under Section 3, First (i) is confined to disputes between employees and carriers whereas jurisdictional disputes are disputes between two groups of employees with the employers characterized as no more than “the helpless victims of quarrels that do not concern them at all.” *N.L.R.B. v. Radio and Television Broadcast Engineers Union (Columbia Broadcasting System)*, 364 U.S. 573, 580-581 (1961).

In addition, Section 3 First (i) provides that disputes between the parties:

“... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such dispute; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board....”

In accordance with the mandate of the statute the Adjustment Board's Rules of Procedure require that no dispute be submitted to it unless the parties previously have conferred on the property. (29 Code of Federal Regulations, Chap. III, Sec. 301.2.)

Thus, since no dispute between the BRC and the Carrier has been “handled in the usual manner” on the property, and since the dispute has not been “referred by petition of the parties or by either party” to the Adjustment Board, the rules of the Adjustment Board would require it to refuse to determine the meaning of the BRC agreement because of prematurity.

The holding of the Court below requiring the Adjustment Board to determine the rights of employees represented by BRC would require the Adjustment Board to disregard its rules which are based on the clear language of Section 3, First (i) which requires that a claim first be “handled in the usual manner” on the railroad.

The Court of Appeals' decision extends the jurisdiction of the Adjustment Board far beyond the plain and unambiguous limits set forth in Section 3, First (i) of the Railway Labor Act and must be reversed.

2. Other provisions of Section 3 of the Railway Labor Act show that Congress did not intend the Adjustment Board to determine jurisdictional disputes

Basic to the Court of Appeals' decision is its assumption that Congress provided the Adjustment Board with jurisdiction in dealing with jurisdictional disputes to make a "complete disposition of the dispute as to all concerned parties." (R. 96) A review of the provisions of the Railway Labor Act dealing with the Adjustment Board, however, makes it clear that such is not the case.

Section 3, First (h) of the Act (45 U.S.C. § 153, First (h)) sets forth the composition of the Adjustment Board. The introductory paragraph provides:

"The said Adjustment Board shall be composed of four divisions, *whose proceedings shall be independent of one another*, and the said divisions as well as the number of their members shall be as follows:" (Emphasis added.)

The Section thereafter proceeds to establish four separate divisions, each to have exclusive jurisdiction over disputes involving employees within their respective divisions.

It is not unusual for employees in a particular division of the Adjustment Board to claim that their collective agreement covers work being performed by employees subject to another division. Such situations have arisen with respect to employees employed as signal department employees, represented by the Brotherhood of Railroad Signalmen, who are within the jurisdiction of the third division of the Adjustment Board, and electrical workers, represented by the International Brotherhood of Electrical Workers, who

are within the jurisdiction of the second division of the Adjustment Board.¹ In such cases, there is nothing in the Railway Labor Act to prevent each of the groups of employees from filing claims before their respective divisions of the Adjustment Board and from receiving sustaining awards.

Furthermore, since the divisions are independent, we know of no procedure whereby one division of the Adjustment Board could obtain jurisdiction to determine the rights of employees within the jurisdiction of another division of the Adjustment Board.

It is true that this problem would not be presented in this case because telegraphers and clerks both are within the jurisdiction of the third division of the Adjustment Board. However, this fact presents even a stronger argument, on equitable grounds, for Congress not providing for the Adjustment Board to determine jurisdictional disputes between such parties.

The Adjustment Board is a bipartisan organization made of an equal number of labor organizations' representatives and Carriers' representatives. (Section 3, First (a), 45 U.S.C. § 153, First (a).) An additional and neutral member of the Adjustment Board is ap-

¹ For example, see Awards of the Adjustment Board (Third Division) Nos. 3999, 4471, and 8217. Other examples include *Hunter v. Atchison, Topeka & Santa Fe Ry.*, 171 F. 2d 594 (7th Cir. 1948), which involved work claimed to be covered both by the agreements of trainmen employees within the jurisdiction of the first division, and porters, within the jurisdiction of the third division; and *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. 2d 527 (8th Cir. 1950), which involved work claimed to be covered both by the agreements of trainmen employees within the jurisdiction of the first division, and of clerks, within the jurisdiction of the third division.

pointed only when there is a deadlock among the partisan members in reaching a majority decision on a dispute before it. (Section 3, First (l) and (n), 45 U.S.C. § 153, First, (l) and (n).)

If the Adjustment Board would have jurisdiction to determine jurisdictional disputes, as contemplated by the Court of Appeals in the present case, it would mean that in each case it would be the Carriers that would decide to whom the disputed work should be assigned.

In the present case, for example, if a dispute between the telegraphers and clerks should be submitted to the third division, it is almost foregone that the telegraphers' representative would vote that the work should be assigned to telegrapher employees, and the clerks' representative would vote in favor of assigning the work to clerk employees. This split among the labor organizations' representatives would enable the carriers' representatives, in each case, to decide the issue.

Surely, it should require the most explicit language to conclude that Congress intended the Adjustment Board to have jurisdiction to determine a dispute in which one group of representatives would have power to determine the dispute in every instance. Nothing resembling such language is present.

Furthermore, in the negotiation of agreements (where the right to strike exists) a carrier could deliberately avoid its bargaining obligations by agreeing to assign the work to both groups of employees and then under the grievance procedure (where there is no right to strike) could unilaterally decide (through car-

rier representatives on the Adjustment Board with the support of one labor member) where it wanted the work assigned. Surely, the Adjustment Board was not designed to replace the bargaining table as the site where collective bargaining agreements are to be fashioned.

The only provision of the Railway Labor Act cited by the Court of Appeals to support its position is Section 3, First (j) (45 U.S.C. § 153, First (j)). This Section provides:

“Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.”

For many years, it was the position of the organizations represented on the Adjustment Board that where one organization filed a claim against a carrier asserting that the carrier had violated its agreement with the organization, the two parties were the only ones “involved” in the dispute and no other party was required by the statute to be given notice of the proceedings. Some courts disagreed. The basis of the disagreement was the courts’ belief that the construction of Section 3, First (j) required that all persons who do, or may, have an interest in the proceedings must be afforded an opportunity to participate. See, for example, *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. 2d 527 (8th Cir. 1950); *Allain v. Tummon*, 212 F. 2d 32 (7th Cir. 1954); *The Order of Railroad*

Telegraphers v. New Orleans, T. & M. Ry., 229 F. 2d 59 (8th Cir. 1956), *cert. den.* 350 U.S. 997.²

As a result of these decisions, the labor organization representatives changed their position and at the present time notice is given to any party who does, or may, have an interest in the proceedings before the Adjustment Board. Pursuant to such change in policy, notice of the proceedings before the Adjustment Board in this case was given to BRC. (R. 75) Thus, there is no issue in this case whether there was compliance with Section 3, First (j) of the Railway Labor Act.

Furthermore, even assuming that BRC was "involved" in the dispute within the meaning of Section 3, First (j), and was required to be given notice of the proceedings before the Adjustment Board, it would not be dispositive of the issue whether the Adjustment Board had jurisdiction to determine, and was required to determine, the rights of employees represented by BRC.

Section 3, First (j) of the Railway Labor Act merely provides for the procedure to be followed by the Adjustment Board in hearing disputes brought before it; it does not pertain to the jurisdiction of the Adjustment Board. Certainly it would be beyond reasonable argument to contend that because the Adjustment Board had authority to notify BRC of the pend-

² The decisions of the Courts of Appeals on this subject are criticized in Kroner, *Minor Disputes Under the Railway Labor Act*, 37 N.Y.U. Law Review 41, 54-57 (1962). This Court has never ruled on the issue. See *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, 370-373 (1955). It has indicated, however, that even if the Courts of Appeals are correct in holding that notice be given to third parties pursuant to Section 3, First (j), that such requirement "does not approach constitutional magnitude." *Whitehouse, supra*, at 371-372.

ency of TCU's claim and to invite BRC to participate if it desired (an invitation which BRC declined (R. 76-77)) that the Adjustment Board thereby acquired jurisdiction to determine the rights of employees represented by BRC, under BRC's agreement.

The jurisdiction of the Adjustment Board is defined in Section 3, First (i), and as we showed above, it extends no further than determining disputes brought before it in the form of a claim that one of the parties to a collective bargaining agreement has breached that agreement. Since neither the Carrier nor BRC has filed a claim with the Adjustment Board, that tribunal lacks jurisdiction to make any determination of the rights of employees under such agreement.

The situation is completely different under the National Labor Relations Act, as amended (herein referred to as the "NLRA"). Under Section 10(k) of the NLRA (29 U.S.C. § 160 (k)), the National Labor Relations Board (herein referred to as the "NLRB") is specifically charged to "hear and determine" jurisdictional disputes. This Court has held that such mandate requires the NLRB to make a decision "that one or the other [group of employees] is entitled to do the work in dispute." *N.L.R.B. v. Radio and Television Broadcast Engineers Union (Columbia Broadcasting System)*, 364 U.S. 573 (1961). Referring to the procedure the NLRB should follow in determining jurisdictional disputes, this Court stated (at 579):

"This language also indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the

employees it represents perform certain work tasks." (Emphasis added.)

Pursuant to this Court's decision in the *C.B.S.* case, the NLRB now decides jurisdictional disputes cases on the basis of such factors as, but not confined to, the skills and work involved, certifications by the NLRB, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators and joint boards, the assignment made by the employer, and the efficient operation of the employer's business. *Lodge No. 1743, IAM, and Jones Construction Co.*, 135 NLRB 1402 (1962).

There is no provision in the Railway Labor Act which even remotely is akin to Section 10(k) of the NLRA, which was added to the Act in 1947. Under Section 3, First (i) of the Railway Labor Act the jurisdiction of the Adjustment Board is limited solely to a determination of whether the collective bargaining agreement has been violated while under Section 10(k) of the NLRA, the collective bargaining agreement merely is to be considered a factor, among many others, in determining which of two groups of employees is entitled to the assignment of work. It would be fully in keeping with its mandate under Section 10(k) of the NLRA, for the NLRB to award work to a group of employees not having a collective bargaining agreement with the employer because of the presence in its favor of a preponderance of other factors as opposed to the other group of employees which does not possess such other factors but merely an agreement to do the work. Such a determination would be wholly improper under Section 3, First (i) of the Railway Labor Act.

A further comparison between Section 3, First (i) of the Railway Labor Act and Section 10(k) of the NLRA, lends additional support to the conclusion that Congress did not intend the Adjustment Board to have jurisdiction to determine jurisdictional disputes. First, it is apparent from Section 10(k) of the NLRA that Congress was entirely capable of making it unmistakably clear if it meant to empower a tribunal to "hear and determine" jurisdictional disputes. It did so in the NLRA, and did not do so under the Railway Labor Act.

Second, each of the difficulties inherent in the Adjustment Board having jurisdiction to determine jurisdictional disputes is not present under the NLRA. Thus, the NLRB is a single body, as opposed to the Adjustment Board which is composed of four "independent" divisions, and the problem of conflicting jurisdictional disputes awards is obviated. Furthermore, the NLRB is a nonpartisan body as opposed to the Adjustment Board which is bipartisan and the inequitable result of the employers in each case determining jurisdictional disputes which would result if the Adjustment Board could make such determinations, cannot occur under the NLRA.

It accordingly is clear that although the Court of Appeals seeks to interpolate Section 10(k) of the NLRA into the Railway Labor Act, such judicial interpolation not only is unauthorized, but is contrary to the applicable provisions of the Railway Labor Act and the whole structure and purpose of the National Railroad Adjustment Board.

B. The Decision of the Court Below Is Not Supported by Decisions of This Court; to the Extent That This Court Has Considered the Issue Herein, the Conclusions Reached by This Court Are Contrary to the Decision of the Court Below

The Court of Appeals considered its determination required by precedent but, as will be shown below, the cases relied on by the Court were not concerned with nor even mentioned the issue presented in this case. We know of no cases in which a court has ruled on the issue of whether the Adjustment Board has jurisdiction to determine, and is required to determine, jurisdictional disputes, and in the only case, also to be discussed below, in which this Court considered the issue, the Court took a position diametrically opposed to that taken by the Court of Appeals.

The *Pitney*³ and *Slocum*⁴ cases relied upon by the Court of Appeals are not determinative of the issue herein. The issue in each of those cases was whether a court had primary jurisdiction to entertain a suit alleging a breach of collective bargaining agreements between a carrier and a union involving an assignment of work. In *Pitney*, action was instituted in the federal courts, and in *Slocum*, suit was filed in the state courts. In each case, this Court held that exclusive primary jurisdiction to resolve disputes involving interpretations of agreements was in the Adjustment Board and not in the courts.

The Court below, however, relies on language of this Court in *Pitney* and *Slocum* that in determining the proper interpretation to be given to the collective bargaining agreements involved in those cases, the Adjustment Board must consider such evidence as usage,

³ *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

⁴ *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950).

practice, and custom in the industry, and also any other agreements the carrier entered into with other unions. The Court below construed this language as an indication that the Adjustment Board was directed to consider both unions as parties to its proceedings and that the Adjustment Board must determine the rights under all agreements in one proceeding.

Even a cursory reading of these cases, however, shows that there is no basis for such construction. All this Court said in *Pitney* and *Slocum* was that the Adjustment Board was to consider all evidence including other agreements the Carrier had with other unions, in determining the proper application or interpretation to be given to the agreement which was the subject of the claim before it.

TCU's position is not to the contrary. This case does not involve a question of whether the Adjustment Board could consider evidence relating to any agreements between the Carrier and BRC as well as evidence concerning practice, custom, or usage which would be relevant to the claim before the Adjustment Board. The Carrier has not contended it was not given an opportunity to present any evidence it chose in the proceedings before the Adjustment Board nor is there any indication that the Adjustment Board refused to consider any evidence.⁵

⁵ There is nothing in the record or in fact to support the statement by the Court below that (R. 94) :

"Other contracts for what appeared to be the same job were excluded by its [the Adjustment Board's] rules of evidence."

Nor is there anything in the Rules of Procedure issued by the Adjustment Board to support the Court's finding. 29 Code of Federal Regulations, Chap. III, Sec. 301, contained in Circular 1, issued October 10, 1934.

The issue here is not whether the Adjustment Board can consider the agreement between the Carrier and BRC; the issue is whether the existence of such other agreement enlarges the jurisdiction of the Adjustment Board so as to require it to adjudicate not only the scope of the TCU agreement but also to adjudicate, in a manner binding on BRC, the meaning of the BRC agreement. This Court neither in *Pitney* nor in *Slocum* decided this issue.

Indeed, this Court has stated that the issue presented herein was not determined by this Court in those cases. Thus, in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), this Court stated (at 371-372):

“Assuming the Act permits the Board to consider the claim of one union in light of competing agreements between Railroad and other unions, see *Order of Railway Conductors v. Pitney*, 326 U.S. 561, does it permit ‘final and binding’ awards to be rendered interpreting both contracts and resolving the independent claims of both unions in a single proceeding?”

The Court did not answer the question in *Whitehouse*. That question must be answered here for the Court below held that not only does the Railway Labor Act permit the Adjustment Board to make final and binding interpretations of both contracts, but the Act requires the Adjustment Board to do so. In any event, it is clear that neither *Pitney* nor *Slocum* answered the question.

The only case in which this Court discussed the issue presented herein is *Whitehouse v. Illinois Central R.R.*, *supra*.

The *Whitehouse* case also was commenced when TCU filed a claim with the Adjustment Board that the

carrier had violated agreements between it and the carrier by not assigning the work in question to employees it represented. The carrier there also had assigned the work to employees represented by BRC. Unlike the present case, however, BRC was not given notice of the proceedings before the Adjustment Board. Before the Adjustment Board could issue a determination, the carrier sought an injunction to restrain the Adjustment Board from deciding the dispute until notice was given.

One of the carrier's contentions was that notice to BRC was necessary so that the entire dispute could be settled at one time, thus securing the carrier against the possibility of awards to both unions since an award to TCU would not prevent BRC from prosecuting a similar claim successfully.

This Court rejected this contention, stating (349 U.S. at 372):

"One thing is unquestioned. Were notice given to Clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceedings. Clerks here have not attempted to intervene. They have merely stated an intention to bring a separate proceeding in case they are affected by an award in this case. Indeed Railroad refers to an understanding between Clerks and Telegraphers whereby the one will not intervene in proceedings initiated before the Board by the other, but will press its claims independently We would thus have to consider whether those potential injuries alleged to flow solely from failure of Clerks to participate may be the basis for judicial intervention where there is neither a legal right of the complaining party to be free from such injuries nor any assurance that judicial action will afford relief."

The Court of Appeals' holding in this case that the existence of an agreement between the Carrier and BRC "in effect" made BRC a party to the proceedings before the Adjustment Board, and that the Adjustment Board, was required to make a "complete disposition of the dispute as to all concerned parties" (R. 96), clearly is inconsistent with this Court's statement in *Whitehouse* that even if notice were given to the Clerks it could be "indifferent to it" and could "refuse to participate" in the proceeding. Certainly this Court did not mean that the Clerks had the privilege to surrender its rights by default, or that the Clerks had the power, by its refusal to participate, to render invalid any award in favor of TCU.

Furthermore, the holding of this Court in *Whitehouse* that the Adjustment Board could proceed with its determination of TCU's claim with no requirement that the Adjustment Board simultaneously make a binding interpretation of the meaning of the BRC agreement, contrary to the decision of the Court below, shows that the existence of other agreements between the carrier and another union does not extend the jurisdiction of the Adjustment Board to require it to determine the scope of the other agreement and the rights of employees covered by that agreement when a dispute concerning the other agreement is not before it.

The same result would be reached under common law in the absence of legislation.

In *Carey v. Westinghouse*, 375 U.S. 261 (1964), two unions subject to the NLRA were engaged in a dispute concerning the assignment of work. One of the unions claiming the work filed a grievance under its contract

with the employer contending that its agreement with the employer covered the disputed work and requested that the grievance proceed to arbitration as required by the agreement.

The employer refused to proceed to arbitration on the ground that the grievance involved a jurisdictional dispute between two unions which should be resolved by the NLRB pursuant to Section 10 (k) of the NLRA. This Court held that the employer was required to arbitrate the grievance. The Court stated (375 U.S. at 265-266) :

“Grievance arbitration is one method of settling disputes over work assignments; and it is commonly used, we are told. To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it. The case in its present posture is analogous to *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, where a railroad and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, ‘Railroad’s resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it. *Id.*, at 373.’ ”

The present case differs from *Carey* only in that arbitration has taken place in the present case in the form of the proceeding before the Adjustment Board,

while it was only prospective in *Carey*.⁶ Since the Court, in *Carey*, directed the parties to arbitrate the dispute, it may be assumed that the award of the arbitrator would be valid and subject to enforcement.

The Court of Appeals for the Fifth Circuit has so construed the *Carey* case. In *International Brotherhood of Firemen and Oilers v. International Association of Machinists*, 338 F. 2d 176 (1964), suit was brought by the Machinists against the Oilers to enforce an arbitration award which required the Oilers to desist from its effort to represent certain maintenance employees. The Oilers contended that the Dis-

⁶ This Court has on numerous occasions held that the decisions of the Adjustment Board are to be treated as decisions of arbitrators. The latest opinion is that of *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965). There, the Court stated (at 263-264):

"In *Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana R. Co.*, 353 U.S. 31, the Court gave a Board decision the same finality that a decision of arbitrators would have. In *Union Pacific R. Co. v. Price*, 360 U.S. 601, the Court discussed the legislative history of the Act at length and pointed out that 'it was designed for effective and final decision of grievances which arise daily' and that its 'statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board' 360 U.S. at 616. Also in *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as 'compulsory arbitration in this limited field,' p. 40, 'the complete and final means for settling minor disputes,' p. 39, and 'a mandatory, exclusive, and comprehensive, system for settling grievance disputes.' P. 39."

Such finality of Adjustment Board awards was recently confirmed by Congress in Public Law 89-456, approved June 20, 1966, Appendix, p. 11a.

trict Court should have declined to enforce the award in view of the necessity of interpreting certifications of the NLRB and because the award would not be final and binding and would conflict with the jurisdiction of the NLRB which has ultimate authority in representation matters.

The Court of Appeals held that this Court's decision in *Carey* supported the decision of the District Court with respect to the jurisdiction of the arbitrator to determine the dispute. With respect to the jurisdiction of the District Court to enforce the award of the arbitrator, the Court stated (338 F. 2d at 179):

"The District Court here went one step further. It enforced the award of the arbitrator. We find no error in this action. It is in logical sequence to the requirement that arbitration be compelled. Jurisdiction to enforce such award follows as a matter of course once the requisite jurisdiction of the arbitrator is found. Cf. *United Textile Workers of America v. Textile Workers Union*, 7 Cir., 1958, 258 F. 2d 743, affirming the judgment of the District Court enforcing an award by the same arbitrator, and under the same contract here involved."

Similarly in the present case, after the jurisdiction of the Adjustment Board to rule on the dispute presented to it is determined, the award is entitled to be enforced and is valid at least with respect to any procedural requirement. No other defect is alleged or can be made the basis of attack on the Award. P.L. 89-456; *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965).

Moreover, this Court's holding in *Carey* that arbitration must proceed despite the absence of the other union, shows that the existence of other agreements

between the employer and other unions does not require a determination of the scope of those other agreements nor a determination of the rights of employees under such agreements.

The Carrier has argued that the Adjustment Board cannot be permitted to determine TCU's claim without determining the rights of employees represented by BRC under BRC's agreement with the Carrier, because this would entail a finding that it is possible that the Carrier has contracted with both unions concerning the work in dispute. The Carrier contends that such a finding would be contrary to Section 2, Ninth of the Railway Labor Act which requires that a carrier bargain only with the certified representative of its employees. To support the contention it cites *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937) which holds that a certified union can obtain injunctive relief to require a carrier to recognize and bargain with the certified representative of its employees and to restrain the carrier from bargaining with any other organization. The Carrier's argument, however, confuses the issue in this case and is without merit.

Section 2, Ninth of the Railway Labor Act is concerned solely with issues of representation; the issue in this case, however, is not at all concerned with representation.

There is no quarrel that TCU represents telegraph employees of the Carrier and that BRC represents clerical employees. TCU's claim did not seek or involve a determination from the Adjustment Board that TCU is the representative of the clerical employees now assigned to the disputed work. TCU sought, and obtained, an Award and Order from the Adjustment Board declaring only that the collective bargaining

contract between TCU and the Carrier was breached when the Carrier failed to assign the disputed work to telegrapher employees represented by TCU.

We know of no cases in which this Court or any court has determined that an employer may contract with as many labor organizations as it desires, assigning the same work to different groups of employees represented by different labor organizations, without any contractual liability to the groups of employees who are thereafter not assigned to perform the work covered in the agreements. The National Railroad Adjustment Board was created to deal with such breaches of agreement; it has performed its function in this case, and its Award and Order should be enforced.

In *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), this Court stated very plainly that a carrier would be liable to each of the unions with which it contracted to assign the same work. Thus, in discussing the contention of the carrier that the presence of the BRC before the Adjustment Board was necessary to avoid the possibility of conflicting Adjustment Board awards, the Court stated (at 372):

".... We would thus have to consider whether those potential injuries alleged to flow solely from the failure of Clerks to participate may be the basis for judicial intervention *where there is neither a legal right of the complaining party to be free from such injuries nor any assurance that judicial action will afford relief.*" (Emphasis added.)

In *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (D.C. Cir. 1942), the Court stated (at 249):

"But if it were shown that the carrier had bound itself by conflicting contracts allocating the work, and thus the dilemma were complete, it would not follow that the enforcement suit is inadequate or was not intended to be exclusive or that declaratory relief would be appropriate. We know of no constitutional protection against the subject matter nor of any which renders inadequate a proceeding, otherwise sufficient, merely because others not parties to it may assert claims inconsistent with its result and perhaps succeed in sustaining them by independent litigation. The risk of multiple liability, that is, the possibility that two or more claimants may assert, severally and independently, similar causes of actions covering identical subject matter is an everyday occurrence."

CONCLUSION

For the foregoing reasons and upon the foregoing authority it is respectfully submitted that the decision of the Court of Appeals should be reversed with direction that the case be remanded to the District Court for further proceedings on TCU's complaint to enforce Award No. 9988 of the Adjustment Board.

Respectfully submitted,

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August 25, 1966.

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APPENDIX

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APPENDIX

The Railway Labor Act

Being An Act to Provide for the prompt disposition of disputes between carriers and their employees and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

* * *

SECTION 2. Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days

designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

• • •

SECTION 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor

members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees,

signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly

submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the

Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respect as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be

included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with

the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * * * *

The National Labor Relations Act

SECTION 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

HEARINGS ON JURISDICTIONAL STRIKES

SECTION 10 (k) Whenever it is charged that any person has engaged in an unfair labor practice within the mean-

ing of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

* * * * *

On June 20, 1966 Congress enacted Public Law 89-456 (80 Stat. 208) which amended Section 3 of the Railway Labor Act. Public Law 89-456 is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That section 3, Second, of the Railway Labor Act is amended by adding at the end thereof the following:

“If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to

agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or ap-

pointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

SEC. 2. (a) The second sentence of section 3, First, (m), of the Railway Labor Act is amended by striking out, "except insofar as they shall contain a money award".

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: "In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination."

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out "~~shall be prima facie evidence of the facts therein stated~~" and inserting in lieu thereof "shall be conclusive on the parties".

(d) The last sentence of section 3, First, (p), of such Act is amended by inserting before the period at the end thereof the following: " : *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order".

(e) Section 3, First, of such Act is further amended by redesignating paragraphs (q) through (w) thereof as para-

graphs (r) through (x), respectively, and by inserting after paragraph (p) the following new paragraph:

“(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division’s order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division’s jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.”

Approved June 20, 1966.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 28

TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Tenth Circuit

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

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Dated at Toledo, Ohio, this
22nd day of September, 1966.

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INDEX

	Page
INTEREST OF THE AMICUS CURIAE.....	2
SUMMARY OF ARGUMENT.....	5
ARGUMENT	6
I. JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD IS LIMITED TO DISPUTES GROW- ING OUT OF GRIEVANCES OR OUT OF THE INTERPRETATION OR APPLICATION OF AGREEMENTS.....	6
II. THE COURT BELOW ERRED IN INVALIDATING THE BOARD'S AWARD FOR FAILURE TO UNDER- TAKE DETERMINATION OF MATTERS BEYOND THE BOARD'S JURISDICTION	9
III. THE DECISION BELOW IS CONTRARY TO THE CONGRESSIONAL SCHEME FOR HANDLING LABOR DISPUTES IN THE RAILROAD INDUSTRY, AND THREATENS CONTINUED EFFEC- TIVENESS OF THE ADJUSTMENT BOARD PROCEDURE	13
CONCLUSION	17
CERTIFICATE OF SERVICE.....	18

CASES CITED

American Trucking Associations, Inc., et al., v. United States, 355 U.S. 141 (1957).....	3
Brotherhood of R.T. v. Howard, 343 U.S. 768, 774.....	9
Division No. 14, Order of Railroad Tel. v. Leighty, 298 F. (2d), cert. den. 369 U.S. 885.....	11
Elgin, Joliet & Eastern R. Co. v. Burley, 325 U.S. 711, 724-725.....	8, 10

CASES CITED (CONTINUED)

	Page
General Committee, B.L.E. v. Missouri-K.-T. R. Co., 320 U.S. 323, 332-333.....	10, 11, 15
Gunther v. San Diego & Arizona Eastern Railway Co., 382 U.S. 257.....	10
Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373 (1942)	3
Order of Railroad Tel. v. Leighty, 298 F. (2d) 17, cert. den. 369 U.S. 885.....	11
Railroad Telegraphers v. Chicago and North Western Railroad Co., 362 U.S. 330.....	10
Railway Labor Executives' Association v. United States, 339 U.S. 142 (1950).....	3
Seaboard Air Line Railroad Company v. Castle, 170 F. Supp. 327.....	12
Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 94 L. Ed. 795, 70 S. Ct. 577.....	9
Southern Pac. Co. v. Joint Council Dining Car Employees 165 F. (2d) 26 (C.A. 9).....	9
Steele v. Louisville & N. R. Co., 323 U.S. 192, 205.....	8
Switchmen's Union of N.A. v. Nat. Mediation Bd., 320 U.S. 297.....	11
Union Railroad Co. v. National Railroad Adjust. Bd., 170 F. Supp. 281.....	12
Virginian Railway v. System Federation No. 40, 300 U.S. 515.....	16
Whitehouse v. Illinois Central R.R., 349 U.S. 366, 372.....	14

STATUTES

	Page
Public Law, No. 442, 73rd Cong., H.R. 9861, appr. June 21, 1934, 48 Stat. 1185.....	7
Railway Labor Act, 48 Stat. 1185, et seq. 45 U.S.C.....	3, 5, 6, 8, 11
Section 2, General Purposes (U.S.C., Sec. 151a, General Purposes).....	6
Sec. 152 First.....	12
Sec. 152, Ninth.....	11
Sec. 153 (p).....	7
Sec. 153 First (h).....	12
Sec. 153 First (i).....	7, 11, 12

MISCELLANEOUS

73rd Congress, 2nd Session; hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce	7
73rd Congress, 2nd Session; hearings on S. 3266, pp. 17, 155, 158.....	8
Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale Law Journal 567, 572.....	15

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PAGE

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Respondent.

**On Writ of Certiorari to the United States Court
of Appeals for the Tenth Circuit**

**BRIEF OF RAILWAY LABOR
EXECUTIVES' ASSOCIATION AS AMICUS CURIAE**

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the position of petitioner urging reversal of the decision of the Court of Appeals below. The consent of all parties to the case has been obtained and such consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Railway Labor Executives' Association, on whose behalf this brief as *amicus curiae* is presented, is a voluntary unincorporated association, comprised of the chief executives of the following standard national and international railway labor organizations:

American Railway Supervisors' Association
 American Train Dispatchers' Association
 Brotherhood of Locomotive Firemen and Enginemen
 Brotherhood of Railroad Signalmen
 Brotherhood of Maintenance of Way Employes
 Brotherhood Railway Carmen of America
 Brotherhood of Railway and Steamship Clerks,
 Freight Handlers, Express and Station Employes
 Brotherhood of Railroad Trainmen
 Brotherhood of Sleeping Car Porters,
 Hotel & Restaurant Employees and
 Bartenders International Union
 International Brotherhood of Boilermakers, Iron
 Ship Builders, Blacksmiths, Forgers and Helpers
 International Brotherhood of Electrical Workers
 International Brotherhood of Firemen & Oilers
 International Organization Masters, Mates & Pilots
 of America
 National Marine Engineers' Beneficial Association
 Order of Railway Conductors and Brakemen
 Railway Employes' Department, AFL-CIO
 Railroad Yardmasters of America
 Seafarers' International Union of North America
 Sheet Metal Workers' International Association
 Switchmen's Union of North America
 Transportation-Communication Employees Union

The principal office of said association is located at 400 First Street, N.W., Washington, D.C.

The foregoing organizations affiliated with the Railway Labor Executives' Association represent, for purposes of collective bargaining under the Railway Labor Act, the bulk of the nation's rail employees, and this Court has recognized the Association as the proper party to appear and speak for these affiliated organizations and their railroad employee members. *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al., v. United States*, 355 U.S. 141 (1957).

Each of these organizations is a party to collective bargaining agreements with nearly every railroad in the United States, governing the rates of pay, rules and working conditions of the craft or class of employees which it represents. Said organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application. It is their further function to provide for the selection and compensation of the labor members of the National Railroad Adjustment Board, the administrative tribunal created by the Act for final determination of such disputes in the event they cannot be settled on the property of the carrier or carriers involved; to process such disputes to the Board on behalf of the employees they represent; and to seek enforcement of the awards and orders of the Board in the event of a failure or refusal of the carrier or carriers to comply therewith.

Under the decision of the court below, an organization seeking to enforce a claim that its agreement had been violated, by assignment of work falling within the scope of that agreement to employees in another craft, must face the

prospect of having its agreement re-written, or modified, to reconcile its provisions with possible conflicting provisions in the agreement pertaining to the other craft. By the same token, organizations other than the claimant, unaware of the existence of any dispute between themselves and the carrier, would be forced before the Board and the courts to do battle for the retention of provisions in their agreements which had been achieved through voluntary collective bargaining, but which might conflict with the asserted coverage of the claimant organization's agreement. And the function of the Adjustment Board would be expanded from that of interpretation and application of agreements so as to encompass the reconciling and rewriting of conflicting agreements.

The extent to which the organizations comprising the *amicus curiae* Railway Labor Executives' Association can continue to fulfill their foregoing statutory duties and functions, and the procedures to which they must resort to do so, are directly and vitally involved in the issues in this case. Also dependent upon the determination of those issues are the future effectiveness, and the proper function and purpose, of the Adjustment Board, responsibility for the creation, operation and financial support of which is shared by these organizations. The issues in this case are thus of great concern to the *amicus curiae*, and their proper resolution by this Court is a matter of the highest importance not merely to the petitioner organization but to railroad labor as a whole.

SUMMARY OF ARGUMENT

Summarily stated, the propositions which will be supported in this brief are as follows:

I. Under the Railway Labor Act the National Railroad Adjustment Board's jurisdiction is limited to disposing of disputes growing out of grievances or out of the interpretation or application of collective bargaining agreements — the so-called "minor disputes". The Board may not rewrite agreements, pass upon their validity, or determine the rights of the parties to contract with respect to particular subject matter, such matters being either non-justiciable or determinable by other tribunals or procedures under the Act.

II. The court below erred in invalidating the award sought to be enforced because of the Board's failure to resolve a so-called jurisdictional dispute between employees in two separate crafts. For the Board to have done so would have required it either to assume the power of reconciling or re-writing potentially conflicting agreements, thus substituting compulsory arbitration for the major disputes handling procedures of Section 6 of the Railway Labor Act; or to invade the province of the National Mediation Board by adjudicating the right of the crafts involved to contract for particular work, and the proper scope of each craft or class of employees. The decision below would also require the Board to ignore clear statutory conditions imposed upon the exercise of its jurisdiction, such as prerequisite handling of disputes in negotiations on the property of the carrier, and limitations upon the jurisdiction of the four Divisions of the Board.

III. The decision below fails to recognize the distinction between disputes over proper interpretation and application of existing agreement provisions relating to work jurisdiction, and other jurisdictional disputes with respect to the negotiation of, or the right to negotiate, such provisions. Other methods and procedures are prescribed by the Railway Labor Act for settlement of the latter type of dispute, and both the legislative history of the Act and previous decisions of this Court demonstrate that such disputes do not lie within the jurisdiction of the National Railroad Adjustment Board. The Board as constituted could not function effectively or as an impartial, or at least equally divided bi-partisan, tribunal in the area of such disputes.

ARGUMENT

I. JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD IS LIMITED TO DISPUTES GROWING OUT OF GRIEVANCES OR OUT OF THE INTERPRETATION OR APPLICATION OF AGREEMENTS.

With the prime objective of attempting to avoid interruptions to commerce resulting from labor disputes in the railroad industry Congress, in enacting the Railway Labor Act, has provided a comprehensive set of regulations for the handling of a number of different kinds of disputes that might arise. The Congressional objectives, as well as a general description of these different disputes, are stated in Section 2, General Purposes (U.S.C., Sec. 151a, General Purposes), as follows:

“(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of em-

ployment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

The foregoing provision was first incorporated in the statute with the adoption of the 1934 amendments (Public, No. 442, 73rd Cong., H.R. 9861, appr. June 21, 1934, 48 Stat. 1185), which also created the National Railroad Adjustment Board. Of the various categories of problems and disputes for which it was thus the express purpose of the statute to provide, it is clear that only the fifth one enumerated was to be committed to final and binding adjudication by the Adjustment Board, whose jurisdiction is set forth in almost identical language in Section 3, First (i), of the Act (45 U.S.C., Sec. 153 (p)).

That the proposed Adjustment Board's function would be limited to the realm of contract interpretation, and would in no way affect the bargaining process itself, was repeatedly brought out in hearings before the Congressional committees considering the 1934 Railway Labor Act. The principal witness before these committees, Federal Coordinator of Transportation Joseph B. Eastman, stated the matter before the House Committee on Interstate and Foreign Commerce (73rd Congress, 2nd Session; hearings on H.R. 7650) as follows:

"The whole matter of working rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon. It is a question of interpreting them. It is minor matters of that kind, and not the questions either of wages or of working rules. The basic matters are left for the process of mediation." (At p. 64; to same effect, see previous testimony of Mr. Eastman at p. 47.)

Mr. Eastman testified in like vein before the Senate Committee on Interstate Commerce (73rd Congress, 2nd Session; hearings on S. 3266, pp. 17, 155, 158), as did Mr. George M. Harrison, President of the Clerks' Brotherhood (p. 33-34).

This view of the limited function of the Board has been confirmed by the decisions of this and other courts. Thus, in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, the Court, in speaking of the various classes of controversy dealt with by the Act, said (p. 723) that the class referable to the Adjustment Board "... contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . ."

Similarly, in *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 205, the Court recognized the Board's limitation to questions of contract interpretation, and its inability to deal with disputes over the validity of particular agreements. Also holding the Board to be limited to the interpretation of agreements as it found them was the decision in

Southern Pac. Co. v. Joint Council Dining Car Employees,
165 F. (2d) 26 (C.A. 9).

To the same effect, in a case involving the validity of an agreement with one craft covering work previously performed by another group of employees, this Court has expressly stated that the dispute could not be resolved by the Adjustment Board, saying:

“... no adequate remedy can be afforded by the National Railroad Adjustment or Mediation Board, The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 94 L. Ed. 795, 70 S. Ct. 577. *This dispute involved the validity of the contract, not its meaning.* . . .”
(*Brotherhood of R. T. v. Howard*, 343 U.S. 768, 774; emphasis supplied.)

II. THE COURT BELOW ERRED IN INVALIDATING THE BOARD'S AWARD FOR FAILURE TO UNDERTAKE DETERMINATION OF MATTERS BEYOND THE BOARD'S JURISDICTION.

It is clear that the decision of the court below is based upon the premise that when one craft processes a claim to the Adjustment Board asserting that its agreement has been violated by assignment of certain work to employees in another craft, the Board is required to bring the second craft before it in the same proceeding and decide the “jurisdictional dispute” by awarding the work to one craft or the other. The court in no way limits the function of the Board to that of interpreting existing agreements, but would require it simply to resolve the dispute by an award determining *which* craft was entitled to the work. Of course, in the event of an overlapping in coverage of the respec-

tive crafts' agreements, resolution of the dispute would necessarily require the Board either to re-write one or both agreements, or to rule on their validity in terms of which craft had the *right* to contract with respect to the subject matter.

This certainly is the contention of respondent, as urged at pages 21-25 of its brief in opposition to certiorari, where it is urged that the Board must determine the validity of agreements in terms of deciding which craft "had the right to contract for any particular work" (Brief in Opposition, p. 24), and that "only one of the two competing unions could have the lawful right to claim a given work assignment, and that the Board's function was to resolve the entire dispute" (Brief in Opposition, p. 21).

It is of course well established that the Board's awards have the final and binding effect of arbitration awards, and that the Board procedure constitutes compulsory arbitration. *Gunther v. San Diego & Arizona Eastern Railway Co.* 382 U.S. 257. But, as we have pointed out, this compulsory arbitration procedure is applicable only to the category of minor disputes committed to the Board's jurisdiction. It is equally well established that major disputes, relating to the making of new agreements rather than interpretation and application of existing ones, are not subject to adjudicatory processes, but are left in the realm of voluntary collective bargaining subject only to exhaustion of the "cooling off" provisions of the statute. *Elgin, Joliet and Eastern R. Co. v. Burley*, 325 U.S. 711, 724-725; *General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323, 332-333; *Railroad Telegraphers v. Chicago and North Western Railroad Co.*, 362 U.S. 330.

Clearly, then, for the Board to "reconcile" agreements by in effect re-writing overlapping provisions with respect to work jurisdiction, as contemplated by the court below, would be to exceed its jurisdiction, and to substitute compulsory arbitration for the voluntary agreement-making procedures of the Act.

By the same token, a determination by the Board as to the validity of agreement provisions, in terms of the right to contract for particular work and the proper scope of a craft or class, would clearly transcend the area of contract interpretation committed to the Board's jurisdiction, and would constitute an invasion of the exclusive jurisdiction of the National Mediation Board under Section 2, Ninth of the Act (45 U.S.C. Sec. 152, Ninth). *Switchmen's Union of N.A. v. Nat. Mediation Bd.*, 320 U.S., 297; *General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323; *Division No. 14, Order of Railroad Tel. v. Leighty*, 298 F. (2d) 17, cert. den. 369 U.S. 885.

In addition to requiring the Board to exceed its subject matter jurisdiction, the decision of the court below would have required it to violate clear statutory conditions imposed with respect to the exercise of its jurisdiction.

Thus, while the Board's right to entertain a claim is predicated upon its prior handling on the property of the carrier "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" (45 U.S.C. Sec. 153 First (i)), the decision of the court below would force the second craft before the Board for compulsory arbitration of a dispute as to its rights which not only had not been handled on the property, but which it did not know existed. Such a result would not only

contravene the plain requirement of the quoted provision of Section 3 First (i), but would prevent any effort at compliance with the duty imposed by Section 2 First of the Act "to exert every reasonable effort . . . to settle all disputes, whether arising out of the application of such agreements or otherwise. . . ." (45 U.S.C. Sec. 152 First.)

In addition, under the statute (45 U.S.C., Sec. 153 First (h)), the Adjustment Board consists of four divisions, each of which has jurisdiction only over disputes involving specified crafts and classes of employees,¹ and "whose proceedings shall be independent of one another." This allocation of jurisdiction and functions is clearly calculated to enhance the advantages, frequently noted by this Court, of having these minor disputes referred to and decided by panels of experts peculiarly familiar with the problems and grievances which have customarily arisen with respect to the craft whose claim is being passed upon.

In a number of instances² a craft which is the petitioner before one division of the Board has charged a carrier with violating its agreement by assignment of work to members of another craft whose grievances and contract claims lie within the jurisdiction of a different Division of the Board. Under the principles adopted by the court below, the second craft would be forced to submit to a final and binding

¹Contrary to the implication contained in respondent's brief in opposition, p. 27-28, it is the craft of employees involved in a dispute, and not the content or job classification of work which they are claiming under their agreement, which determines the division of the Board having jurisdiction to entertain the claim.

²In spite of respondent's assertion (brief in opposition, p. 27) that "This presents no real problem and would seldom occur", the problem is real, has often occurred, and has given rise to complicated litigation. E.g., see *Seaboard Air Line Railroad Company v. Castle*, 170 F. Supp. 327, and *Union Railroad Co. v. National Railroad Adjust. Bd.*, 170 F. Supp. 281.

declaration of its rights by a division having no jurisdiction to entertain its claims, on which it is unrepresented¹, and whose members lack familiarity with the problems, customs and practices pertaining to the aspects of railroad operations performed by the employees which it represents. Jurisdictional objections aside, such a holding goes far to defeat the Congressional objective of having these disputes resolved by experts in their field.

III. THE DECISION BELOW IS CONTRARY TO THE CONGRESSIONAL SCHEME FOR HANDLING LABOR DISPUTES IN THE RAILROAD INDUSTRY, AND THREATENS CONTINUED EFFECTIVENESS OF THE ADJUSTMENT BOARD PROCEDURE.

The comprehensive scheme adopted by Congress for the handling of labor disputes in the railroad industry, with certain categories of disputes being placed under the jurisdiction of highly specialized tribunals and others being removed from adjudicatory processes and committed to voluntary collective bargaining, is seriously jeopardized by the decision below, as is the continued effectiveness of the National Railroad Adjustment Board, the tribunal to which Congress committed, for final and binding decision, the whole area of minor disputes in the industry.

The impact of the decision below upon the Congressional scheme can be stated quite simply. Subject only to certain procedural steps calculated to induce agreement and avoid interruptions to commerce, Congress left the negoti-

¹The composition of the Board as provided for in Sec. 3 of the Act has resulted in almost all of the employee craft organizations having an officer of the organization sitting as a labor member of the division having jurisdiction over that craft.

ation of labor contracts to be accomplished through voluntary collective bargaining. It gave the National Mediation Board exclusive and generally non-reviewable authority to determine the representative having the right to negotiate, and the identity of the employees, or the scope of the craft or class, to be represented. And it gave the National Railroad Adjustment Board exclusive and generally non-reviewable authority to interpret and apply the agreements thus negotiated.

The decision below, as we have indicated, would require the Adjustment Board to go beyond its statutory authority, and invade both the jurisdiction of the Mediation Board, and the area of non-justiciable disputes left to voluntary bargaining, thus breaking down the lines so carefully drawn by Congress. Insofar as it might determine the dispute which gave rise to this litigation by holding that only one craft organization could have the legal right to negotiate for the work in question, as urged by respondent, and then deciding which of the two had that right, it would clearly be assuming the functions and authority of the National Mediation Board. If, on the other hand, it undertook to reconcile conflicting agreements of the two crafts, it would be invading the area of non-justiciable disputes, and interfering with the operation of free collective bargaining.

We believe that such a ruling is clearly inconsistent with the legislative history of the Act, and in conflict with previous rulings of this court. In *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, involving a dispute remarkably similar to this one with the exception that the Board had not given notice to the Clerks of the pendency of the Telegraphers' claim, the Court said, "Were notice given to Clerks they could be indifferent to it; they would be within their legal

rights to refuse to participate in the present proceeding.” (349 U.S., p. 372.) And despite respondent’s effort to distinguish it (brief in opposition, p. 23) on the ground that the holding of non-justiciability of a dispute such as this occurred in a case in which a *court* had been asked to decide which union had the right to contract for particular work, the rationale of this Court’s decision in *General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323, is clearly inconsistent with any concept of Adjustment Board jurisdiction. Indeed, contrary to respondent’s assertion (brief in opposition, footnote 38, p. 23), the Adjustment Board *was* mentioned (320 U.S., p. 331), along with the statutory procedure for enforcement of its awards, in the course of the Court’s discussion of adjudicatory processes that *had* been provided by Congress, and by way of preface to and in contrast with the concept of non-justiciability which the Court held applicable to the dispute involved.

We have already adverted to legislative history demonstrating the Congressional intent to limit the function of the Adjustment Board to that of contract interpretation, as opposed to the making of agreements. This insulation of the Board from involvement with the making of agreements eliminated a situation which had plagued its predecessor, the United States Railroad Labor Board. (Garrison, “The National Railroad Adjustment Board: A Unique Administrative Agency”, 46 Yale Law Journal 567, 572.)

Finally, the effectiveness and impartiality of the Board as an adjudicatory tribunal would be largely impaired by the principles adopted by the court below.

A craft, whether the one making a claim or the one forced before the Board to oppose the claimant craft, would

be placed in the position of having its agreement reconciled with another agreement to which it was a complete stranger, and in the negotiation of which it was legally banned from participating. *Virginian Railway v. System Federation No. 40*, 300 U.S. 515.

But perhaps the most drastic effect would be to give the carrier members of any division of the Board the complete balance of power to decide any work jurisdiction dispute before it. As we have noted, most crafts are represented in the group of labor members sitting on the division having jurisdiction over their claims. Where, as here, both crafts are under the same division, it is apparent that if that division were compelled to decide that one craft had the right to the work in question and that the other did not, the representatives of the two crafts would most certainly vote against each other. The carrier members, uninhibited by any craft affiliations and voting as a body, would simply award the work to whichever craft the particular railroad involved wished to give it to, being assured of the support of at least one labor member to break the deadlock and obviate appointment of a neutral referee.

A railroad could with equal efficacy control the outcome of a dispute between crafts falling under different divisions of the Board, by the simple expedient of submitting the dispute itself instead of waiting for either labor organization to do so, and selecting the division having jurisdiction over and including a representative of the craft which it wished to have the work.

The inequity of this inevitable result of the ruling below is apparent, and it could only lead to a complete breakdown of the Board.

CONCLUSION

The manner in which the court below has resolved these issues represents a drastic threat to the continued effectiveness of the National Railroad Adjustment Board as an instrumentality for the fair and expeditious settlement of disputes over the interpretation of railroad collective bargaining agreements. Its decision is based upon an erroneous conception of the proper scope of the Board's jurisdiction, is contrary to express statutory provisions, legislative history, and decisions of this Court, and should be reversed.

Respectfully submitted,

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*Attorneys for Railway Labor
Executives' Association
As Amicus Curiae*

Dated at Toledo, Ohio, this
22nd day of September, 1966.

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Labor Executives' Association, as *amicus curiae*, do hereby certify that on the 22nd day of September, 1966, I served a copy of the brief of Railway Labor Executives' Association as *amicus curiae* upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Milton P. Kramer, Lester P. Schoene and Martin W. Fingerhut, 1625 K Street, N.W., Washington, D.C. 20006, Attorneys for petitioner, Transportation-Communication Employees Union; F. J. Melia, Harry Lustgarten, Jr. and James A. Wilcox, 1416 Dodge Street, Omaha, Nebraska 68102, Attorneys for respondent, Union Pacific Railroad Company.

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Richard R. Lyman

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**In the
Supreme Court of the United States**

October Term, 1966

No. 28

**TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,**

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

BRIEF FOR RESPONDENT

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October 1, 1966

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PAGE

I N D E X

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Summary of Argument	13
Argument	18
I. The Adjustment Board has Both the Jurisdiction and Duty to Consider all Facts and Issues Necessary to a Complete Disposition of the Dispute.	23
A. This Court in the Pitney and Slocum Cases has Determined the Jurisdiction and Obligation of the Adjustment Board to Hear and Determine Interunion Work-Assignment Disputes.	25
B. There is no Conflict Between the Court of Appeals' Decision and This Court's Decision in Whitehouse and Carey.	32
C. The Adjustment Board has Jurisdiction and Whatever Authority is Necessary to Resolve Work-Assignment Disputes.	37
D. The Exercise of Adjustment Board Jurisdiction Cannot be Controlled by the way TCU Framed the Issues.	44
E. "Overlapping Contracts" Assigning the Same Work to Different Groups of Employees are not Possible under National Labor Policy.	49
F. Neither the Divisional Arrangement nor the Bipartisan Structure of the Adjustment Board Impairs the Exercise of Jurisdiction Over Both	

INDEX—Continued

	Page
Parties to an Interunion Work-Assignment Dispute.	54
G. Nothing in the Railway Labor Act, the Structure of the Adjustment Board nor Section 10(k) of the National Labor Relations Act Negates the Jurisdiction of the Adjustment Board Over Work-Assignment Disputes.	60
1. Section 3. First (i) and (j) Contemplate That the Adjustment Board Would Have Jurisdiction to Consider and Resolve Interunion Work-Assignment Disputes.	60
2. The Differences in Section 10(k) of the NLRA and the Structure of the NLRB do not Negate the Congressional Intent That the Adjustment Board Should Also Have Jurisdiction to Adjudicate Work-Assignment Disputes.	63
II. BRC was an Indispensable Party to TCU's Action to Enforce Adjustment Board Award 9988.	65
A. BRC has a Real and Substantial Interest Which Could be Directly Affected by This Case.	67
1. Enforcement of Award 9988 as Sought by TCU Would Require a Transfer of Work From Clerks to Telegraphers.	67
2. The Clerks Have a Substantial Interest in any Action Which Could Deprive Them of Work.	67
B. The Limitations of the Gunther Case and P. L. 89-456 do not Affect BRC's Indispensability.	71
C. BRC's Presence in the Enforcement Action	

INDEX—Continued

	Page
was Necessary to Protect Union Pacific in its Compliance With any Decree or Judgment.	74
Conclusion	76
Appendix A	1a
Appendix B	18a
Appendix C	21a

TABLE OF CITATIONS

CASES:	Page
Allain v. Tummon, 212 F. 2d 32 (CA-7, 1954)	47, 68, 75
Brennan v. Delaware, L. & W. R. Co., 103 N. E. 2d 532, 303 N. Y. 411 (NY-1952), cert. den. 343 U. S. 977 (1952)	31, 62
Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co., 373 U. S. 33 (1963)	24, 64
Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co., 199 F. 2d 384 (CA-5, 1952)	31
Brotherhood of Railroad Trainmen v. Chicago, Milwan- kee, St. Paul and Pacific R. Co., 62 L. R. R. M. 2828	47
Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U. S. 30 (1957)	64
Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768 (1952)	40, 41, 58
Brotherhood of Railroad Trainmen v. Swan, 214 F. 2d 56 (CA-7, 1954)	56
Brotherhood of Railroad Trainmen v. Templeton, 181 F. 2d 527 (CA-8, 1950)	56, 68

TABLE OF CITATIONS—Continued

	Page
Brotherhood of Railroad Trainmen v. Toledo P. & W. R. Co., 321 U. S. 50 (1944)	27
Carey v. Westinghouse Electric Corp., 375 U. S. 261 (1964)	19, 31, 32, 33, 34, 35, 36, 37
Div. No. 14, Order of Railroad Tel. v. Leighty, 298 F. 2d 17 (CA-4, 1962), cert. den. 369 U. S. 885	42
Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 (1945), affirmed on rehearing, 327 U. S. 661 (1946)	23, 24, 38, 39, 40
Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160 (1927)	36
Fitzgerald v. Haynes, 241 F. 2d 417 (CA-3, 1957)	76
General Committee, B. L. E. v. M-K-T R. Co., 320 U. S. 323 (1943)	27, 41, 42, 52, 59, 62
Green v. Brophy, 110 F. 2d 539 (CA-D. C., 1940)	68
Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U. S. 257 (1965)	17, 24, 51, 71, 72, 74
Humphrey v. Moore, 375 U. S. 335 (1964)	58
Hunter v. Atchison, T. & S. F. Ry. Co., 171 F. 2d 594 (CA-7, 1948)	47, 68
International Brotherhood of Carpenters v. C. J. Mon- tag & Sons, Inc., 335 F. 2d 216 (CA-9, 1964), cert. den. 379 U. S. 999 (1965)	49, 54
International Brotherhood of Firemen and Oilers v. In- ternational Assn. of Machinists, 338 F. 2d 176 (CA-5, 1964)	37
J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332 (1944)	52
John Wiley & Sons v. Livingston, 376 U. S. 543 (1964)	50, 51

TABLE OF CITATIONS—Continued

Page

Kirby v. Pennsylvania R. Co., 188 F. 2d 793 (CA-3, 1951)	75
Langnes v. Green, 282 U. S. 531 (1931)	66
Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks, 188 F. 2d 302 (CA-7, 1951)	44
Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al., 26 L. R. R. M. 2237 (DC-III, 1950)	22
Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al., 128 F. Supp. 331 (DC-III, 1954)	22, 23, 31, 59
National Labor Relations Board v. Local 19, International Bro. of Longshoremen, 286 F. 2d 661 (CA-7, 1961), cert. den. 368 U. S. 820	52
National Labor Relations Board v. Local 1291, International Longshoremen's Association, 345 F. 2d 4 (CA-3, 1965), cert. den. 382 U. S. 891 (1965)	49, 62
National Labor Relations Board v. Radio & Television Broadcast Engineers Union, 364 U. S. 573 (1961)	31, 32, 39, 49, 54, 64
New York Central R. Co. v. Brotherhood of Locomotive Firemen, 355 F. 2d 503 (CA-7, 1966)	31, 39
Order of Railway Conductors v. Pitney, 326 U. S. 561 (1946), reh. den. 327 U. S. 814	11, 14, 25, 26, 27, 28, 29, 31, 43, 62
Order of Railway Conductors v. Swan, 329 U. S. 520 (1947)	55
Order of Railway Conductors v. Switchmen's Union of N. A., 269 F. 2d 726 (CA-5, 1959)	60
Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 61 F. Supp. 869 (E. D.-Mo., 1945), vac. and	

TABLE OF CITATIONS—Continued

	Page
rem. 156 F. 2d 1 (CA-8, 1946), cert. den. 329 U. S. 758, reh. den. 329 U. S. 829	18
Order of Railroad Telegraphers v. New Orleans, Texas & M. R. Co., 229 F. 2d 59 (CA-8, 1956), cert. den. 350 U. S. 997	31, 67, 69, 70, 71
Order of Railroad Telegraphers v. Ry. Express Agen- cy, 321 U. S. 342 (1944)	27, 52
Order of Railroad Telegraphers v. Southern Pacific Company, No. Civ. 4812-Phx.	9
Seaboard Air Line R. Co. v. Castle, 170 F. Supp. 327 (DC-Ill., 1958)	57
Shields v. Barrow, 21 U. S. 409, 17 How. 130 (1854)	66, 76
Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 (1950)	11, 14, 25, 27, 28, 29, 30, 43, 62
Southern Pac. Co. v. Joint Council Dining Car Employ- ees, 165 F. 2d 26 (CA-9, 1948)	39, 40
Southern Pac. Co. v. Switchmen's Union of North America, 356 F. 2d 332 (CA-9, 1965), on reh. 356 U. S. 336	60
Stark v. Wickard, 321 U. S. 288 (1944)	27
State of California v. Southern Pac. Co., 157 U. S. 229 (1895)	76
Steele v. Louisville & N. R. Co., 323 U. S. 192 (1944)	40, 41, 58
Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237 (1935)	66
Switchmen's Union of N. A. v. Nat. Mediation Board, 320 U. S. 297 (1943)	27, 41

TABLE OF CITATIONS—Continued

	Page
Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks, et al., 281 U. S. 548 (1930)	51
Textile Workers v. Lincoln Mills, 353 U. S. 448 (1957)	49
Thomas v. New York, Chicago & St. Louis R. Co., 185 F. 2d 614 (CA-6, 1950)	39
Truax v. Raich, 239 U. S. 33 (1915)	68
U. S. v. American Ry. Exp. Co., 265 U. S. 435 (1924)	66
U. S. Pipe and Foundry v. National Labor Relations Board, 298 F. 2d 873 (CA-5, 1962), cert. den. 370 U. S. 919	52
Union Railroad Co. v. National Railroad Adjustment Board, 170 F. Supp. 281 (DC-Ill. 1958)	57
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U. S. 593 (1960)	43
Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 (1937)	15, 51, 52, 60
Washington v. U. S., 87 F. 2d 421 (CA-9, 1936)	67
Whitehouse v. Illinois Central R. Co., 349 U. S. 366 (1955)	32, 33, 34, 35, 36
 Statutes and Rules:	
Federal Rules of Civil Procedure:	
Rule 14(a)	10
Rule 19	66
Rule 19(b)	10
Public Law 89-456, 80 Stat. 208	11, 17, 71, 72
Railway Labor Act of 1926, 44 Stat. 577	23

TABLE OF CITATIONS—Continued

	Page
Railway Labor Act, 48 Stat. 1185, 45 U. S. C. §§ 151-164:	
Section 2, Ninth	20, 37, 41, 42, 62
Section 3, First (a)	57, 58
Section 3, First (c)	57, 58
Section 3, First (i)	6, 11, 26, 41, 42, 60, 61, 63
Section 3, First (j)	7, 8, 13, 16, 32, 33, 56, 59, 60, 61, 62, 63, 71, 73, 75
Section 3, First (k)	39, 61, 63
Section 3, First (l)	7, 9, 24, 32, 39, 61, 63
Section 3, First (m)	9, 73
Section 3, First (p)	4, 10, 11, 66
Section 3, First (q)	11
National Labor Relations Act, 61 Stat. 136, 29 U. S. C. §§ 151-168:	
Section 10(k)	60, 63, 64
Section 301	35
Miscellaneous:	
Moore, Federal Practice, Vol. 3 (1966 Special Supplement)	66
National Railroad Adjustment Board, First Division Award 20038, 149 N. R. A. B. (1st Div.), 322	48
National Railroad Adjustment Board, Third Division	
Award 8258, 79 N. R. A. B. (3d Div.), 829	7
Award 8656, 83 N. R. A. B. (3d Div.), 337	7, 9, 70, 73
Award 9988, 96 N. R. A. B. (3d Div.), 286	4, 9, 10, 16, 44, 45, 65, 67, 68, 71

TABLE OF CITATIONS—Continued

	Page
Kaufman, <i>Representation in the Railroad Industry</i> , Lab. L. J., July, 1955	19
Thirteenth Annual Report of the National Mediation Board (1947)	20
Report of the Vice Presidents of the Order of Railroad Telegraphers to the Thirty-Sixth Regular and Third Quadrennial Session of the Grand Division, Miami Beach, Florida, June, 1964	45
Report of G. E. Leighty to Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers, Chicago, Ill., June, 1960	5
National Labor Relations Board Cases Nos. 5-RM-422, 5-RM-500, 5-RC-1670, 5-UC-3	35

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PAGE

**In the
Supreme Court of the United States**
October Term, 1968

No. 28

**TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,¹**

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

BRIEF FOR RESPONDENT

Respondent, Union Pacific Railroad Company, for the reasons herein detailed submits that the judgment of the United States Court of Appeals for the Tenth Circuit in that court's case No. 7968 is correct and should be affirmed by this Court.

¹ Formerly "The Order of Railroad Telegraphers."

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (R. 78)² is reported at 231 F. Supp. 33. The opinion of the court of appeals dated July 22, 1965, is not officially reported but is found at 59 L. R. R. M. 2993. That court's opinion dated October 8, 1965 (R. 90), in which it withdrew its prior opinion, is officially reported at 349 F. 2d 408 and unofficially reported at 60 L. R. R. M. 2244.

JURISDICTION

The jurisdictional requisites are set forth in the petitioner's brief (Br. 2).

QUESTIONS PRESENTED

(1) Whether the National Railroad Adjustment Board in deciding an interunion work-assignment jurisdictional dispute must consider and determine the entire dispute or controversy including the contracts, usage, practices and customs of both claiming unions where the union representing employees performing the disputed work was determined by the Board to be involved and given notice of the proceeding but, in pursuance of an agreement of all railroad unions declined to participate therein but has stated that if as a result of the Adjustment

² "R." refers to the printed transcript of record; "Br." refers to the brief of petitioner; and "RLEA" refers to the brief filed by Railway Labor Executives' Association as *amicus curiae*.

Board proceedings any work is taken away from employees it represents, redress will be sought by it in separate proceedings against the railroad.

(2) Whether, in an action brought in a U. S. District Court to enforce an award of the National Railroad Adjustment Board sustaining the claim of the union representing telegraph employees to certain work which is being performed by clerical employees the union representing clerical employees performing the disputed work is an indispensable party to such action where, in addition to monetary penalties, a coercive decree is sought which would take the disputed work from clerical employees, and where there may be questions as to the validity or enforceability of such award which might be raised and decided in such action.

STATUTES INVOLVED

The pertinent sections of the Railway Labor Act, as amended, 44 Stat. 577 (1926), 48 Stat. 1185 (1934), 45 U. S. C. §§ 151-164, the National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§ 151-168, and Rule 19 of the Federal Rules of Civil Procedure, before and after revision, are set forth in Appendix A, *infra* at p. 1a.

STATEMENT OF THE CASE

We believe that a somewhat more complete statement of the facts of this case than appear in petitioner's brief will contribute to an understanding of the issues.

This case is here on certiorari from the decision of the Court of Appeals for the Tenth Circuit affirming the dismissal of the action by the United States District Court at Denver, Colorado. It is a statutory action brought by petitioner, Transportation-Communication Employees Union (the "TCU"); under Section 3, First (p) of the Railway Labor Act to enforce Third Division Award 9988 (96 N. R. A. B. (3d Div.) 286; R. 5-70), of the National Railroad Adjustment Board (the "Adjustment Board").

In 1952, Respondent, Union Pacific, installed IBM office machines in its various railroad yard offices which radically changed the procedure of maintaining car records—work which had been traditionally performed by clerical employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (the "BRC"; R. 3). In the operation of these machines, a communication function previously performed manually by telegraph employees, represented by TCU, is automatically performed when the machines handle the clerical work previously performed manually by clerical employees.

TCU Grand President Leighty described the operation of these machines as follows:

"* * * The International Business Machine Company brought to the railroad industry the IBM machine in the last few years, which can combine the work of the clerical employee, for example, who before prepared the communication and gave it to the telegrapher to transmit, and the work of the telegrapher, because it actually transmits the communication which formerly was transmitted by the tele-

grapher. Thus, as the clerk does the work on the IBM which he formerly did on the typewriter, preparing a communication for transmission, this machine at the same time cuts the tape the simpler machine (the teletype) used to cut in the telegraph office, and with the assistance of reperforators or a wire chief in combining circuits, this clerk can also in most cases from his clerical station do the actual transmitting in one operation." Report of G. E. Leighty to Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers, Chicago, Ill., June, 1960, page 192, quoted in Third Division Award 9988 (R. 60).

The basic function of the IBM machines was the performance of clerical work and clerical employees were assigned the work of punching IBM cards and operating the machines.

TCU filed a grievance, called a "claim" in the railroad industry, asserting that the performance of such work, including the card punching, belonged exclusively to telegraph employees, that its assignment to and performance by clerical employees was in violation of the collective agreement between TCU and Union Pacific, and that such work should be assigned to telegraph employees (R. 3, 5-7). TCU also sought penalty payments consisting of eight hours' pay for each eight-hour shift, both day and night, since August 25, 1952, and continuing "until such time that this work is properly assigned to such [telegraph] employees [R. 5, 7]."

The claim as framed by TCU purported to seek a declaration that the Telegraphers' Agreement gave the telegraph employees the exclusive right to the perform-

ance of the work on the IBM machines. It was not, however, the type of breach of contract action familiar to the courts. TCU relied upon the so-called "scope rule" of the agreement. This rule simply lists positions which are to be covered by the agreement (R. 14). It does not define the duties of the positions listed. Other rules of the agreement advanced by TCU as supporting its claim to the exclusive performance of the work are set forth in the record (R. 14-16). They are all administrative provisions and do not even purport to define duties or grant work. Nor did TCU argue to that effect (R. 16-18).

Two claims were filed by TCU, one involved the work assignment at Las Vegas, Nevada, and the other at Salt Lake City, Utah (R. 33, 52).³ These claims were ultimately filed as separate disputes with the Adjustment Board by TCU under Section 3, First (i) of the Act. The records in the two dockets were identical insofar as the work-assignment dispute was concerned. The factual statements and argument of TCU and Union Pacific concerning the work-assignment dispute were set forth in the docket covering the dispute at Salt Lake City and were incorporated by reference in the Las Vegas docket (R. 46).

In both disputes, Union Pacific contended that since the objective of TCU's claims was the taking of work from clerical employees they were "involved" and that the Adjustment Board would be without jurisdiction unless they or their collective representative, BRC, were notified and permitted to participate as required under

³ Claims were also filed covering various other points. Only the Las Vegas and Salt Lake claims were progressed to the Adjustment Board.

Section 3, First (j). TCU denied that the clerks had any interest in the dispute.

The Salt Lake City and Las Vegas disputes, although filed with the Adjustment Board at the same time, became separated and the Salt Lake City dispute was reached first. The Adjustment Board refused to notify BRC of the dispute because of the refusal of the labor members.⁴ The Adjustment Board deadlocked and a referee was appointed under Section 3, First (1). In Award 8258, 79 N. R. A. B. (3d Div.) 829, 864, the Adjustment Board held that BRC was in fact "involved" and refused to proceed to a consideration of the merits until notice had been given "to the *parties*, Carrier, Order of Railroad Telegraphers, and Brotherhood of Railway Clerks."

As a result the Adjustment Board gave notice of the dispute to BRC and with the same referee sitting, again considered the dispute, and on January 12, 1959, rendered Award 8656 in which it held that the disputed work was properly assigned to and performed by the clerical employees and that TCU's agreement was not violated by such assignment. 83 N. R. A. B. (3d Div.) 337.

More than two years later, the same work-assignment dispute, but the claim which arose at Las Vegas, was considered by the Adjustment Board. In the meantime,

⁴ At that time, it was the policy of the various railroad labor organizations and, of course, followed by the labor members on the Adjustment Board in work-assignment jurisdictional disputes to refuse to give notice under Section 3, First (j) and to prohibit participation in Adjustment Board proceedings by anyone except the involved railroad and the petitioning union. *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372 (1955); *Allain v. Tummon*, 212 F. 2d 32, 35 (CA-7, 1954). This policy is detailed in Appendix B, *infra*, p. 18a, containing excerpts from the Findings of Fact entered in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, 128 F. Supp. 331 (DC-Ill., 1954).

the various railroad labor organizations affiliated together as the Railway Labor Executives' Association (the "RLEA") had changed their policy and had agreed that in these work-assignment disputes, "third party" notices to the other union should be issued by the Adjustment Board. The RLEA prescribed a form letter to be used as a reply by any union so notified, and it was agreed that such union would "not otherwise appear or participate in the proceeding."⁵

Thus, in the Las Vegas dispute, the Adjustment Board, as required by Section 3, First (j), found BRC to be an "involved" party and notified it of the dispute, advising that it could "appear and file papers and documents [R. 75]." BRC President George M. Harrison wrote the Adjustment Board the RLEA-prescribed letter (R. 76; Appendix C, *infra*, p. 21a) in which he stated that it was his "understanding" that the dispute was simply one between TCU and Union Pacific involving an interpretation of TCU's agreement with Union Pacific and that neither BRC nor the clerical employees it represented were involved. He also asked the Adjustment Board to advise him if his "understanding of the nature of the dispute" were incorrect. (The Adjustment Board did not answer his letter.) The letter also stated that the rights

⁵ This policy understanding is set forth in Interrogatory No. 1 and Answer thereto in Interrogatories to the Plaintiff dated December 9, 1964, and Answers dated December 18, 1964, filed in *The Order of Railroad Telegraphers v. Southern Pacific Company*, No. Civ. 4812-Phx., pending in the U. S. District Court for the District of Arizona. A certified copy of these documents has been lodged with the Clerk of this Court. At the oral argument before the court of appeals below, these documents were accepted by and were before that court after counsel for TCU had stated he had no objection. The policy declaration referred to and attached to the Answers to the Interrogatories is reproduced in Appendix C, *infra*, p. 21a.

of Union Pacific clerical employees were "predicated" upon BRC's agreement with Union Pacific. However, in recognition of the fact that resolution of TCU's claim might adversely affect clerical employees, President Harrison stated that if as a result of the Adjustment Board proceedings any "*work* covered by such [BRC] agreement"⁶ was taken from clerical employees, BRC would proceed separately against Union Pacific before the Adjustment Board "to correct any such violation of our agreement [R. 77]." BRC did not further participate in the dispute.

Award 8656, covering the work-assignment dispute at Salt Lake City, held the work was properly assigned to clerical employees and that TCU's agreement had not been violated thereby. Under Section 3, First (m) of the Railway Labor Act this determination was "final and binding" on TCU. Yet the Adjustment Board in the same work-assignment dispute at Las Vegas but with a different referee⁷ rendered Award 9988 in which it sustained TCU's claim that such assignment violated the TCU agreement, finding that the work was improperly assigned to clerical employees and that such work should be assigned to telegraph employees. The Adjustment Board also directed that Union Pacific should pay the "senior idle employe covered by the Telegraphers' Agreement" a day's pay for each 8-hour shift since October 5, 1952, when the machines at Las Vegas were used (R. 51). There is no indication in the Adjustment Board's opinion

⁶ Throughout this brief, all emphasis is supplied unless indicated otherwise; also, footnotes will be omitted from all quotations.

⁷ Adjustment Board referees are appointed on an *ad hoc* basis. Section 3, First (1).

that it considered the BRC Agreement, or the custom, practices or claims thereunder (R. 47-50).

Union Pacific did not comply with Award 9988 and TCU filed this enforcement action under Section 3, First (p) of the Railway Labor Act in the District Court for the District of Colorado. In its prayer for relief TCU asked that the court enforce the award "by writ of mandamus or otherwise" and, in addition, that Union Pacific be ordered to "make an accounting of all monies due" under the award (R. 4).

The District Court sustained Union Pacific's motion to dismiss, finding that the Adjustment Board had made BRC a party to the board proceedings and holding BRC to be indispensable to the enforcement action (R. 85).⁹ Although given the opportunity, TCU refused to make BRC a party defendant and final judgment of dismissal was entered (R. 87) from which an appeal was taken to the United States Court of Appeals for the Tenth Circuit.

In an opinion dated July 22, 1965, the court of appeals found that the Adjustment Board had failed to construe TCU's contract with regard to, and with reference

⁸ The court below found that the Adjustment Board considered TCU's contract as if BRC's contract did not exist (R. 94).

⁹ In the district court, TCU suggested Union Pacific should have utilized the third party procedures provided under Rules 14(a) and 19(b) of the Federal Rules of Civil Procedure. But it was shown that the dispute involved work being performed by clerical employees at Las Vegas, Nevada, and the unit of BRC which represented clerical employees at Las Vegas was limited geographically to the territory from Ogden, Utah, to Los Angeles, California. TCU did not pursue the point in the court of appeals below. Under Section 3, First (p), TCU could have brought its enforcement action—

"* * * in the District Court of the United States for the district in which he [petitioner] resides or in which is located the principal operating office of the carrier or through which the carrier operates."

to BRC's contract and position and vacated the award. The court remanded the case to the Adjustment Board to hold "a complete hearing" which should "include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties." 59 L. R. R. M. 2993, 2996.

On October 8, 1965, the court below withdrew its prior opinion and judgment,¹⁰ substituting therefor a different opinion and judgment (R. 90) in which it affirmed the district court's judgment of dismissal for lack of an indispensable party and also because the Adjustment Board had failed to properly exercise its primary jurisdiction (R. 96). The court pointed out that if BRC had been joined in the enforcement action "the matters relating to their [BRC] position and contract could have been presented to the court thereby filling the same void we find to exist [R. 96]."

The court of appeals recognized this case as "but another episode in the long-standing jurisdictional struggle" between BRC and TCU (R. 91). It found that the authority and jurisdiction of the Adjustment Board over this type of a work-assignment dispute under Section 3,

¹⁰ Union Pacific had filed a petition for rehearing limited to the question of the jurisdiction of the court to remand the case to the Adjustment Board under Section 3, First (p) and a motion for permission to file it out of time. The court below did not act on these further pleadings. At that time Section 3, First (p) empowered district courts to "enforce or set aside" Adjustment Board orders. Effective June 20, 1966, Public Law 89-456 was enacted and district courts are now given specific jurisdiction in enforcement actions "to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct." P. L. 89-456, Section 2(a), now Section 3, First (q) of the Railway Labor Act, Appendix A, *infra*, p. 12a.

First (i) was clearly established in the *Pitney* and *Slocum* cases.¹¹ It also said that "it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks' Union [R. 93]." The notice requirement, the court said, is derived from the "scope and nature of the issues before the Board [R. 94]," rejecting any idea that scope and nature of the issues which are involved in a work-assignment dispute are to be derived only from the manner in which TCU might frame its claim. The court below pointed out that:

"This 'concern' is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose [R. 94]."

According to the court of appeals "the fundamental issues before the Adjustment Board included those pertaining to the Clerks and to their contract" and that "the Clerks for all practical purposes thereby become parties to the administrative proceedings [R. 95-96]." With the real issues of the interunion dispute thus defined and the Adjustment Board's jurisdiction established, it follows that "the Adjustment Board must exercise" its authority "over the whole dispute at one time, not half at one time

¹¹ *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946), and *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

with one set of participants, and half at another [R. 95].” Since the Adjustment Board decided telegraph employees’ rights with reference only to TCU’s agreement, the court held the Adjustment Board had failed to decide the entire dispute presented for decision and thus had failed to meet the responsibilities of its primary jurisdiction. The dismissal of the case by the trial court was affirmed (R. 96).

SUMMARY OF ARGUMENT

I. The basic question here presented concerns the jurisdiction and duty of the Adjustment Board to hear and decide a jurisdictional work-assignment dispute involving two groups of employees represented by different unions (BRC and TCU) as to which group should be assigned to perform certain work being performed by clerks represented by BRC.

The fact that while the dispute submitted by TCU to the Adjustment Board was framed so as to purport to be only a two-party dispute between TCU and Union Pacific, it was, in fact, an attempt by TCU to secure for employees it represents work which was assigned to clerical employees represented by BRC. BRC was involved in the dispute which was recognized by the Adjustment Board in giving BRC the notice required by Section 3, First (j) of the Railway Labor Act, in effect, making BRC a party to the proceeding. While BRC declined to participate in the proceeding, pursuant to an understanding with TCU and other railroad unions, it advised the Board that it

would progress a separate claim against the railroad if its interests were affected. The Board then decided the dispute on the basis of its interpretation of the TCU agreement and as if BRC's agreement and practices thereunder did not exist. The court of appeals below properly held that in such circumstances the Adjustment Board failed to properly exercise its jurisdiction and resolve the entire dispute.

The Adjustment Board was created under Section 3 of the Railway Labor Act to hear and determine all disputes in the railroad industry of a "minor" nature, i.e., disputes arising out of grievances or the interpretation and application of collective bargaining agreements. Under that section of the Act it was empowered and obligated to consider the interests of all parties involved and to render a final award resolving the entire controversy as to all such parties. This Court in *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946), reh. den. 327 U. S. 814, and *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), held that the Adjustment Board had the jurisdiction and obligation to resolve such interunion work-assignment disputes of this precise nature.

TCU' objections to the decision of the Circuit Court of Appeals is essentially premised upon the theory that under ordinary contract law, the railroad could have bound itself by so-called "overlapping contracts" granting the same work to different unions, and that its claim involves simply an action for money damages under its own contract without any relationship to the contractual rights of BRC. This is not possible, however, under the

National Labor Policy as expressed in the labor statutes. This Court has many times recognized that neither the common law nor commercial contract law is controlling in the field of labor contracts. A collective bargaining agreement is a "code" of conduct which cannot be treated as an ordinary private agreement.

Under the Railway Labor Act a railroad is not free to contract with whomever it chooses, but is obligated to bargain only with the employees' true representative and no other. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515 (1937). Since there is but one job, if one union has properly secured a contract for the performance of such work, any attempt to contract the same work to another union would be contrary to the mandate and purposes of that Act.

Nor is it possible to avoid what is in reality a dispute between two unions as to which should have jurisdiction over a given type of work merely by framing a grievance in the form of a claim for money damages for breach of a single contract. The real issues of the dispute must be determined from a consideration of the actual purposes and effects and not merely from the form chosen by the claimant.

Neither is there validity to TCU's contentions that a limited scope of powers and inappropriate structure of the Adjustment Board should preclude its exercise of such jurisdiction. The scope rules in the agreements involved in these work-assignment disputes, like TCU's agreement involved here, normally contain no specific

contractual grants of work, but rather a list of positions to be interpreted against the background of custom, usage and practice. Resolution of allegedly conflicting agreements therefore would normally not require anything more than an interpretation of the agreements each in the light of the other.

The Adjustment Board's powers are not so limited. Despite the fact that the Act does not specify what powers it should exercise or what standards it should employ, it still has the responsibility and duty to establish such procedure and exercise such authority as may be necessary to meet its statutory obligations. The potential difficulties with the Board's structure which TCU purports to anticipate would not be the result of statutory limitations, but something which the Board and the parties could avoid by proper action under the statutory provisions.

II. TCU, in its action to enforce Award 9988 of the National Railroad Adjustment Board, did not join BRC which represents the clerical employees presently performing the work awarded to TCU employees by that Award. In addition to the fact that a prior award had held that such work was properly assigned to BRC employees, they have at least a possessory interest in such work which is entitled to protection in the enforcement action.

In recognition of BRC's interest, the Adjustment Board gave BRC the formal notice required by Section 3,

First (j) of the Railway Labor Act and in effect made it a party to the proceedings.

TCU's action to enforce the Award sought an actual transfer of the work, but even an enforcement of the money claim alone would have the effect of ousting the BRC employees from their jobs.

Despite the subsequent decision of this Court in *Gunter v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965), and the enactment of P. L. 89-456, there are a number of important issues in which the BRC would have had a valid interest and a right to have adjudicated in the enforcement action. Union Pacific also has an enforceable right that BRC have the opportunity to raise and have adjudicated any issues in which it might have an interest in order that it will thereby be bound and Union Pacific protected in its subsequent compliance with any judgment or decree issued in the enforcement action.

Clearly BRC's presence in the enforcement action was therefore indispensable, and TCU's refusal to join BRC, after being afforded an additional opportunity to do so by the district court, justified the dismissal of the action.

ARGUMENT**Introductory**

There is involved in this case a dispute, between two competing unions, one representing clerical employees and the other telegraphers, as to which group of employees should be assigned to perform certain work. The dispute centers on the current problem resulting from automation and the critical question as to which group of employees will perform the work which remains after automation.

Even though the instant matter arises because of automation it is actually but a more recent facet of an old work-assignment dispute. For many years BRC has complained about the performance of clerical work by telegraphers. On the other hand, TCU maintains its right to the performance of some clerical work. The dispute has been pursued on many railroads. It became very severe during the depression in the late 1920s with the retrenchments in personnel. As early as 1932, BRC and TCU were in dispute over the performance of clerical work by telegraphers. This was two years before the 1934 amendments to the Railway Labor Act which established the National Railroad Adjustment Board. (61 F. Supp. 870) As the court below noted, this case is "another episode in the long-standing jurisdictional struggle [R. 91]" between BRC and TCU. The early history of this matter is detailed in the district court's opinion in *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 61 F. Supp. 869 (E. D.-Mo., 1945), vac. and rem. 156 F. 2d 1 (CA-8, 1946), cert. den. 329 U. S. 758, reh. den. 329 U. S. 829.

In 1944, the dispute reached the point that BRC filed formal charges against TCU with the Executive Council of the American Federation of Labor. BRC President George M. Harrison accused TCU "of invading our [BRC] work jurisdiction." (61 F. Supp. 873) After a hearing, the AFL issued its decision which stated:

"The facts are clear that the Brotherhood [BRC] was granted jurisdiction over all railroad clerical work of the character above described and that the ORT [TCU] has invaded the work jurisdiction of the said Brotherhood granted by the American Federation of Labor. Their violation of clerks jurisdiction by the ORT cannot be excused because it has continued for some time. The very purpose of the A. F. of L. in granting work jurisdiction to International Unions would be defeated if their contention were accepted. It would breed non-respect for the rights of affiliation and induce industrial conflict that will inevitably result in work interception.

"The Executive Council finds that the ORT is violating the jurisdiction of the Brotherhood of Railway Clerks, et al and instructs said ORT to confine its members to the work jurisdiction granted by the A. F. of L., and directs that any member of the ORT performing clerical work be disassociated from membership." (61 F. Supp. 874)

As this Court has observed,¹² "the term 'jurisdictional' is not a word of a single meaning." In the railroad industry there are two kinds of jurisdictional disputes. One type is the "representation dispute" which is between two unions as to which one will represent the employees in a craft or class.¹³ An example would be a dispute

¹² *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 263.

¹³ For general review of this type of dispute see Kaufman, *Representation In the Railroad Industry*, Lab. L. J., p. 437, July, 1955.

between the Brotherhood of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen over which union should be the designated and authorized representative of conductors on a certain railroad. Under Section 2, Ninth, of the Railway Labor Act this type of dispute is resolved by the National Mediation Board usually through an election except where "any other appropriate method of ascertaining the names of [the employees'] duly designated and authorized representatives" is followed, e. g., cross checks of employee authorizations against a railroad's payroll records. Where two unions are involved, the Mediation Board generally conducts an election; the "other appropriate method" being followed where only one union is involved.¹⁴ Resolution of the representation dispute results in the original, or a change in, designation of the collective bargaining representative for the involved craft or class.

The other type of jurisdictional dispute is the "work-assignment dispute" where the conflict is between two groups of employees which are already represented by a different union with each group claiming the exclusive right to perform certain work. This is the kind of dispute involved here. The resolution of this kind of dispute does not result in any change in union affiliation nor in the designation of a different collective bargaining agent. Whatever the outcome of the work-assignment dispute, each group of employees would continue to have the same union as their collective representative. Settlement of this type of dispute would, however, result in an

¹⁴ *Thirteenth Annual Report of the National Mediation Board* (1947), p. 10.

increase in the amount of work available to be performed by one group and a decrease for the other group.

This BRC-TCU dispute can appear as either type of jurisdictional dispute. The difference results from the manner in which the moving party for its own tactical advantage frames the issue. Thus, in the instant case TCU, had it desired, could have sought an election by applying to the National Mediation Board, and upon meeting certain requirements an election might have been held. It would have then been a representation dispute. Instead, however, TCU made this a work-assignment dispute by claiming that Union Pacific had violated the Telegraphers' Agreement in assigning the work to clerical employees. This careful framing of the claim gave the dispute the appearance of a simple run-of-the-mill common law breach of contract action over the interpretation of an agreement and involving only TCU and Union Pacific. Under this approach, TCU was able to argue that its dispute at the Adjustment Board did not involve BRC or the clerical employees who were performing the work.

This same type of tactic has been followed by both TCU and BRC on many railroads and its use over the years has lead the Adjustment Board to make conflicting awards involving the same work on the same railroad. A result which is squarely at war with one of the basic purposes of the Railway Labor Act—set forth in Section 2—to provide for the prompt and orderly settlement of *all* disputes growing out of grievances or the interpretation of agreements.

Both BRC and TCU employed this tactic against the Missouri-Kansas-Texas Railroad Company resulting in

long and protracted litigation but no resolution of the problem. That litigation points to the full reach of this case. A series of Adjustment Board awards were rendered in proceedings brought separately by TCU and BRC against the M-K-T each alleging a simple breach of their own agreement and each claiming the exclusive right to the performance of the same work. As a result, the Adjustment Board issued conflicting awards in which the Board found the same work had been contracted exclusively to both telegraphers and clerks. BRC and TCU ultimately filed separate enforcement actions in U. S. District Courts in Missouri and Texas seeking to compel M-K-T to comply with different awards but involving the same work. (128 F. Supp. 362)

At the Adjustment Board, because of the policy of the labor unions, neither union was notified of nor permitted to participate in the disputes filed by the other union. Faced with this dilemma and in an effort to have the matter resolved, M-K-T filed an action in the U. S. District Court at Chicago, Illinois, to enjoin the enforcement of the awards. A preliminary injunction was granted in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, 26 L. R. R. M. 2237 (DC-Ill., 1950), affirmed *sub nom. in Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 188 F. 2d 302 (CA-7, 1951). After a trial, TCU and BRC were enjoined from enforcing the awards and the Adjustment Board was directed to reopen and consolidate all of the cases allowing full participation, after notice, by all parties—TCU, BRC, and the railroad. (128 F. Supp. 331) The court directed that the Board should consider

the agreements of both BRC and TCU as well as the custom and practice thereunder. TCU and BRC appealed to the Court of Appeals for the Seventh Circuit, which they later dismissed.

It appeared that at last these work-assignment disputes which had plagued the M-K-T for years were to be finally decided in one proceeding with both TCU and BRC participating. (128 F. Supp. 331 at 372-375). The Adjustment Board pursuant to the district court's decree reopened the dockets and issued the required notice. Before the scheduled hearing was held, however, BRC and TCU withdrew all of these disputes from the Adjustment Board, thereby aborting any further Board action or possible resolution of the dispute.¹⁵

With only minor changes in details, this same story could be written as to many railroads.

I. THE ADJUSTMENT BOARD HAS BOTH THE JURISDICTION AND DUTY TO CONSIDER ALL FACTS AND ISSUES NECESSARY TO A COMPLETE DISPOSITION OF THE DISPUTE.

By amendments enacted in 1934, Congress replaced the unsuccessful voluntary procedures under Section 3 of the Railway Labor Act of 1926 (44 Stat. 577) for the settlement of disputes growing out of grievances and the interpretation and application of agreements in the railroad industry.¹⁶ A compulsory procedure was enacted

¹⁵ See Judge Minor's order in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, No. 50 C 684, dated June 24, 1958.

¹⁶ These were denominated as "minor disputes," i. e., those over the meaning and application of agreements as distinguished from "major disputes" which relate to the making of collective agreements. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722 (1945), affirmed on rehearing, 327 U. S. 661 (1946).

which would assure that *all* of these minor disputes would be resolved. Congress' intent was clear—the new procedure was to be all-inclusive. It declared in Section 2 that it was a general purpose of the Act to avoid any interruption to commerce and to provide for the prompt and orderly settlement of *all* such disputes. It is clear from the legislative history that an orderly, certain and conclusive procedure was being provided.

The 1934 amendments, drafted by Joseph B. Eastman, the Federal Coordinator of Transportation, represented a victory for the railroad unions in their efforts to obtain a certain and conclusive method of settling all minor disputes by Adjustment Boards established on a national basis. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 727 (1945). It is the duty of the Board to agree upon an award in settlement of all disputes submitted to it. Where agreement is not reached by the Board itself, a neutral person or "referee" is to be selected either by the Adjustment Board or the National Mediation Board who is required to "*make an award.*" Section 3, First (1).

In *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965), this court pointed out:

" * * The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs and practices."*

Referring to its decision in *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U. S. 33 (1963), the

Court went on to state:

"* * * prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as '*compulsory arbitration in this limited field*,' p. 40, '*the complete and final means for settling minor disputes*,' p. 39, and '*a mandatory, exclusive and comprehensive system for resolving grievance disputes*.' P. 38."

- A. This Court in the Pitney and Slocum cases has determined the jurisdiction and obligation of the Adjustment Board to hear and determine interunion work-assignment disputes.**

The problem of interunion work-assignment disputes is not new to this Court, and it has consistently held that such disputes were within the jurisdiction of the Adjustment Board and were to be resolved by it.

Twenty years ago in *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946), reh. den. 327 U. S. 814, this Court was faced with a "jurisdictional dispute involving the railroad and two employee accredited bargaining agents [p. 562]." It was held that the Adjustment Board was especially created to "interpret *contracts* such as these in order *finally to settle* a labor dispute [p. 565]."

Pitney involved a work-assignment dispute between the Order of Railway Conductors (ORC) and the Brotherhood of Railroad Trainmen (BRT) over the manning of certain yard engines. ORC filed suit in a U. S. District Court.

BRT intervened and the matter was referred to a master who found that the work should be assigned to BRT conductors. The court of appeals dismissed, af-

firmed by this Court on certiorari, on the basis that disputes of this nature were exclusively within the jurisdiction of the Adjustment Board. A determination of this type of dispute required an "interpretation of *these contracts*" and under Section 3, First (i), "the court should not have interpreted the *contracts* for purposes of finally adjudicating the dispute between the *unions* and the railroad."

Justice Black, speaking for the Court,¹⁷ pointed out that "Congress thus designated an agency peculiarly competent to handle the basic question here involved [*Id.* at p. 566]," and:

"* * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. * * * *For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The*

¹⁷ The Court's decision in *Pitney* was unanimous with respect to the Adjustment Board's jurisdiction to resolve work-assignment disputes. While Justice Rutledge dissented on the basis of his view that the ORC was entitled to an injunction until the Board resolved the matter, he was otherwise wholly in agreement with the majority as shown in his dissent:

"* * * This in turn will depend upon the effect which the Board finds should be given to the prior agreements, including not only the 1940 contract with O. R. C., but the basic agreements of 1927 and 1928 with O. R. C. and B. R. T., respectively, as affected by the establishment of switching limits in 1929 and other matters bearing upon the interpretation of the written contracts and the rights of the parties." (p. 569, n. 2)

factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. * * *"
(*Id.* at p. 567)

Citing *General Committee v. M-K-T R. Co.*, 320 U. S. 323;¹⁸ *Switchmen's Union v. Board*, 320 U. S. 297; *Brotherhood of R. Trainmen v. Toledo P. & W. R. Co.*, 321 U. S. 50; *Order of R. Telegraphers v. Ry. Express Agency*, 321 U. S. 342.

A few years later in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), this Court was again faced with an interunion work-assignment dispute similar to that involved in *Pitney* and almost identical to that in this case. TCU and BRC each claimed under their separate agreements with the railroad certain jobs which the railroad had assigned to clerks. The railroad brought a declaratory judgment in a New York court, naming both TCU and BRC as defendants, seeking an interpretation of both agreements. The court interpreted the contracts in favor of BRC. The New York Court of Appeals af-

¹⁸ The suggestion by *Amicus* RLEA that the rationale of *General Committee, B. L. E. v. Missouri-K-T R. Co.*, *supra*, makes interunion work assignment disputes nonjusticiable by the Adjustment Board as well as courts (RLEA 15) overlooks this Court's decisions in *Pitney* and *Slocum*. The Court in the *General Committee* case was treating a representation matter, and it specifically stated:

"That new provision [Section 2, Ninth] gave the National Mediation Board an adjudicatory function in the settlement of representation disputes." (320 U.S. at p. 330)

It seems doubtful that the *General Committee* case would have been cited in *Pitney* if it felt the nonjusticiable rationale was to be extended to the Adjustment Board.

Moreover, the Court subsequently explained its decision in the *General Committee* case as follows:

"* * * This result was reached because of this Court's view that jurisdictional [representation] disputes between unions were left by Congress to mediation rather than adjudication. 320 U.S. 302 and 337. That is to say, no personal right of employees, enforceable in the courts, was created in the particular instances under consideration. 320 U.S. 337. * * *" *Stark v. Wickard*, 321 U. S. 288, 306 (1944).

firmed, 299 N. Y. 496, 87 N. E. 2d 532. On certiorari this Court reversed:

"We hold that the jurisdiction of the Board to adjust grievances and disputes *of the type here involved* is exclusive." (*Id.* at 244)

Mr. Justice Black, again spoke for the Court pointing out that these disputes furnish a "potent cause of friction leading to strikes" and that the Act thus—

"* * * represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for *adjustment of railroad-employee disputes growing out of the interpretation of existing agreements.* * * * (*Id.* at 243)

Reference was made to the *Pitney* case:

"* * * There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute *involving the railroad and two employee accredited bargaining agents . . .*' Our ground for this holding was that the court 'should not have interpreted the contracts' but *should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field.* 326 US at 567, 568." (*Id.* at 243)

Pitney and *Slocum* were at the heart of the decision of the court of appeals below. TCU challenges this reliance, insisting those two cases did not even "mention" the issues involved here and did not involve the question of Adjustment Board jurisdiction to determine interunion work disputes. In short, TCU argues that those cases are not "determinative" here (Br. 27) reading those cases as only involving the question as to whether a court can

entertain a suit "between a carrier and a union [Br. 27]." It is suggested (Br. 27-28) that this Court in deciding *Pitney* and *Slocum*, was unaware of the facts in those cases.

It is submitted, however, that this Court was fully aware that by its decision in *Pitney* it determined the jurisdiction of the Adjustment Board to include a controversy between two unions over a work-assignment dispute. Moreover, this was specifically called to the court's attention in the petition for rehearing which was filed by ORC. At page 2 of that petition ORC raised the same point that TCU does here in arguing that the Court in *Pitney*:

"* * * has accorded the Adjustment Board a more extensive jurisdiction than that granted to it by Congress. Congress limited the jurisdiction of the Adjustment Board to disputes between employees and the carriers, and *did not grant jurisdiction to the Board to hear and decide 'jurisdictional disputes' between two distinct crafts and classes of employees.*"

The petition for rehearing was denied.¹⁹ (327 U. S. 814)

¹⁹ Many of the arguments now raised by *Amicus* RLEA and TCU concerning the jurisdiction of the Adjustment Board were called to the Court's attention in ORC's petition for rehearing. Thus, at page 3 of that petition, ORC stated:

"* * * If 'jurisdictional disputes' between two or more crafts were to be submitted to such a board, the labor representatives on the board would be split by their respective individual interests in the controversy and the carrier representatives would be inclined to remain united. The result would be that a group of employees, or their statutory representative, aggrieved by carrier action in these circumstances would be forced to submit the controversy to a division of the Adjustment Board one of whose labor members is hostile to its position, with the decision resting in the hands of the carrier members entirely. The advantages of balanced representation with submission of deadlocked cases to a neutral referee would be destroyed and an instrument of oppression would be placed in carrier hands."

Justice Reed's dissent in *Slocum* was also premised on much the same arguments now argued by TCU and *Amicus* RLEA (339 U. S. 245 *et seq.*).

A mere reading of the *Slocum* decision compels the rejection of TCU's attempted narrow consideration of that case. Moreover, TCU's present position in this case is contrary to the arguments which it made to the Court in *Slocum*—arguments which were adopted by this Court in reaching its decision.

In the *Slocum* case, the railroad in seeking the declaratory construction of the TCU and BRC agreements alleged that it was afforded no such remedy before the Adjustment Board, that it could not bring the claims of TCU and BRC jointly before the Board to obtain a determination binding on both TCU and BRC (par. 30; *Slocum* R. 13). TCU denied this allegation (*Slocum* R. 19), thus admitting the Adjustment Board's jurisdiction to interpret both the BRC and TCU agreements in one Board proceeding.

In its brief in *Slocum*, TCU argued that the Adjustment Board had jurisdiction of the same three-party dispute brought in Court:

"The present controversy, is almost a prototype of the kind of case that is heard by the Railroad Adjustment Board every day. This tribunal is recognized by carriers and labor unions alike as the appropriate forum for the prompt and expert settlement of such controversies." (TCU brief, *Slocum*, p. 29)

And:

"Even if it be assumed, however, that the carrier was entitled to be relieved of obligation under one or the other contract, this would not justify the ousting of the statutory tribunal, which clearly has jurisdiction over the entire case and all of the parties." (TCU brief, *Slocum*, p. 33)

Other courts have since also held that the Adjustment Board has the primary jurisdiction and duty to decide interunion disputes which are involved in a grievance against a railroad. *Brennan v. Delaware, L. & W. R. Co.*, 103 N. E. 2d 532, 303 N. Y. 411 (NY, 1952), cert. den. 343 U. S. 977; *New York Central R. Co. v. Brotherhood of Locomotive Firemen*, 355 F. 2d 503, 505 (CA-7, 1966); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 199 F. 2d 384 (CA-5, 1952).

The theory now advanced by TCU here would reduce Adjustment Board handling of interunion work-assignment disputes to an exercise of futility. Nothing would be resolved—indeed, every time the Adjustment Board decided a work assignment dispute in favor of the claiming union another dispute would be created. *Missouri-Kansas-Texas R. Co. v. N. R. A. B., et al.*, 128 F. Supp. 331 (DC-Ill., 1954); *Order of Railroad Telegraphers v. New Orleans, Texas & M. R. Co.*, 229 F. 2d 59 (CA-8, 1956), cert. den. 350 U. S. 997.

In his dissent in *Carey v. Westinghouse Electric Corp.*, 375 U. S. 261, 275 (1964), Mr. Justice Black pointed out that in both the Labor Management Relations Act and the Railway Labor Act, Congress hoped to “abate” jurisdictional disputes “between unions over which union members would do certain work,” citing *Radio & Television Broadcast Engineers Union and Pitney*. (Id. at 275, n. 2)²⁰ It is submitted that adoption

²⁰ Justice Black also noted that in these situations the employer “has done nothing wrong” and to subject him to damages was contrary “to the basic principles of common everyday justice.” (375 U. S. 261, 275)

of TCU's position would simply fan the jurisdictional fires which Congress intended to put out.

The court below correctly decided that the Act did not intend that these jurisdictional disputes be decided in a "piecemeal manner." (R. 94) In *Labor Board v. Radio & Television Broadcast Engineers Union*, 364 U. S. 573 (1961), this Court clearly recognized that to decide a work-assignment dispute such as this meant a resolution of the whole dispute, including which union should perform the work.

Congress' use of the words "make an award" in Section 3, First (1) of the Railway Labor Act, indicates a clear intention that the disputes or controversies in their entirety were to be resolved. There is no basis for suggesting that Congress intended the Adjustment Board should decide these disputes on a piecemeal basis. To do so would be contrary to the basic and underlying general purposes of the Act and the general duties imposed.

B. There is no conflict between the Court of Appeals' decision and this Court's decision in *Whitehouse and Carey*.

TCU's challenge of the court of appeals' decision is essentially based upon the decisions of this Court in *Whitehouse v. Illinois Central R. Co.*, 349 U. S. 366 (1955) and *Carey v. Westinghouse Electric Corp.*, 375 U. S. 261 (1964). It contends that *Whitehouse* conflicts with the court of appeals' holding that having been given notice under Section 3, First (j), "[the] Clerks for all practical purposes thereby become parties to the administrative proceeding [R. 96]" and that *Whitehouse* shows

that the Adjustment Board does not have jurisdiction to determine the rights and agreement scope of employees other than those filing the original claim (Br. 31). TCU even argues that *Whitehouse* "stated very plainly" that a carrier could be liable to two unions for the same work (Br. 36). The *Whitehouse dicta* is also relied upon by *Amicus* RLEA. (RLEA 14)

The Court in *Whitehouse* did refer to a number of issues which are also involved in this case, but it carefully refrained from deciding those questions and properly predicated its decision entirely upon the sole basis of prematurity. *Whitehouse* involved an attempt by a railroad to enjoin further Adjustment Board action for failure to give the Section 3, First (j) notice to other parties involved. The Court simply held that judicial relief should be denied "at this stage of the administrative process" because the railroad's "resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it [*Id.* at 373]." That the court's decision in *Whitehouse* represented only a "hands-off policy" was subsequently reaffirmed in *Carey v. Westinghouse Corp.*, 375 U. S. 261, 267.

The statement in *Whitehouse*, to which TCU and RLEA refers, to the effect that even if notice were given to the Clerks they could be "indifferent to it" and could "refuse to participate [Br. 31; RLEA 14]," in the context of that decision was simply a recognition that the Clerks could not be forced to participate and did not mean nor imply that their presence in the dispute should be ignored or that a decision would not still be binding upon them.

Similarly, the Court's observation in *Whitehouse* that there was no "legal right of the complaining party to be free from such injuries," did not, as TCU contends (Br. 36), constitute a holding that the railroad could be liable to both unions for the same work. In fact, the Court was not there even referring to the possibility of double liability but rather to the possibility of double vexation and specifically to the railroad's claim that it would suffer irreparable injury because it "would be required to devote time and money to what it deemed an invalid proceeding [*Id.* at 370]." This is confirmed in the final paragraph of the decision where the Court observed that:

"* * * among the injuries asserted by Railroad, only the possibility that it is being put to needless expense incident to the pending Board proceeding will necessarily be involved if judicial relief is denied at this stage of the administrative process * * *." (*Id.* at 373)

On the other hand, the Court in *Carey*, which it indicated was "analagous" to *Whitehouse*, recognized the fundamental principle that an employer could not both be obligated to provide one union with the work and liable for damages to another union for not being given the same work.

The Court in *Carey* followed the lead of *Whitehouse* by adopting a "hands-off policy" permitting arbitration of a work-assignment dispute to continue without the presence of the union representing the employees performing the disputed work. This was done on the theory that the employer's objections were merely premature in that "the arbitration may as a practical matter end the controversy [*Id.* at 265]." As in *Whitehouse*, it was felt that

resort to the court had "preceded any award, and one may be rendered which could occasion no possible injury to it [*Id.* at 266]." At the same time, however, the Court also recognized that "unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute [*Id.* at 265]," and that the dispute might still end up before the NLRB²¹ whose decision "would, of course, take precedence [*Id.* at 272]." The court then significantly pointed out that if the employer's assignment of work were in accordance with the NLRB decision, "it would not be liable for damages under § 301 [*Id.* at 272]."

In other words, if an NLRB decision in the *Carey* case should ultimately decide that the union performing the work was entitled to it, the employer would not be liable to the claimant union for damages for breach of its collective bargaining contract under Section 301 of the NLRA. Clearly, this negates TCU's contention that an employer might be obligated to give the work to one union and liable to another union for damages under its contracts.

TCU also argues that because both *Whitehouse* (Br. 31) and *Carey* (Br. 34) held that the proceedings could proceed without the presence of the other union, that it was not necessary to consider the scope or rights of the employees covered by the other union's agreement, and that "it may be assumed" that the award "would be valid and subject to enforcement [Br. 33]." Such a conclusion is not warranted.

²¹ The decision of the arbitrator in *Carey* did not end the dispute and, after a rather tortuous route, ultimately ended up before the NLRB where it is presently pending. (NLRB cases Nos. 5-RM-422, 5-RM-500, 5-RC-1670, 5-UC-3)

Both of those decisions were based upon prematurity which, as the Court indicated in *Carey*, is simply an adoption of a "hands-off policy." In both cases this policy was specifically justified by the fact that an award *might* be rendered "which could occasion no possible injury" to the employer, e. g., a denial award. Those decisions imply no prejudgment whatsoever as to the ultimate validity of a sustaining award which might injure both the employer and the absent union. Certainly, there is no basis for believing that the mere ordering of arbitration in both cases furnishes any basis that the award "may be assumed to be valid and subject to enforcement." (Br. 33)

On the contrary, both decisions indicated a recognition of the fact that the ultimate validity of a sustaining award might have to be determined in some subsequent proceeding. In *Whitehouse*, the Court (at 349 U. S. 372) noted that alleged defects in the award might have to be tested in an enforcement action and cited *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 174 (1927). In the latter case, the Court premised its denial of an injunction against an order of the Federal Trade Commission on the grounds that the objections urged would be more appropriately considered in an enforcement action where the objectors would "have full opportunity to contest the legality of any prejudicial proceeding against them." In *Carey*, as noted above, the Court specifically pointed out that the arbitration proceeding "might not put an end to the dispute" and that it might still have to be finally resolved in an NLRB proceeding

whose decision "would, of course, take precedence" over the award.²²

C. The Adjustment Board has jurisdiction and whatever authority is necessary to resolve work-assignment disputes.

Both TCU and RLEA argue that the Adjustment Board does not have authority to resolve interunion work-assignment disputes, because its authority is limited to the interpretation of agreements (Br. 9, 17; RLEA 6-9) and resolution of possible conflicts in such agreements would invade the jurisdiction of the National Mediation Board under Section 2, Ninth (Br. 35; RLEA 11).

But the resolution of these work-assignment disputes is accomplished simply by an *interpretation* of generally phrased agreements and does not involve rewriting, modifying or amending such agreements. Any potential conflicts in such agreements arise from a resolution of highly ambiguous contract provisions rather than from any irreconcilable conflict based on unambiguous provisions. In this case, TCU's claim was not predicated upon any provision of its agreement specifically granting the involved work to telegraph employees, but upon a broad in-

²² *International Brotherhood of Firemen and Oilers v. International Assn. of Machinists*, 338 F. 2d 176 (CA-5, 1964), does not support TCU's contention that once the Adjustment Board's jurisdiction over the dispute is established, its award is thereby entitled to be enforced (Br. 34). That case involved the enforcement of an arbitration of a jurisdictional dispute between two unions pursuant to a "no-raid agreement" and the defense was essentially predicated upon a challenge to the authority of the arbitrator. Under those circumstances, the Court held that since *Carey* had held that agreements to arbitrate such disputes should be enforced, the Court's jurisdiction to enforce such an award "follows as a matter of course." That decision, disposing of a challenge to an arbitrator's jurisdiction to resolve a jurisdictional dispute between two unions, did not consider the effect that an improper procedure and failure to resolve a work-assignment dispute might have upon the enforceability of an award.

interpretation of the highly indefinite and ambiguous provisions of its scope rule (R. 14), and as the Adjustment Board noted in its award—

“* * * where, as here, the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreement.” (R. 48)

There is no reason to believe that the Adjustment Board could not have resolved this interunion dispute simply by a joint interpretation of one agreement with the other and the custom, practice and usage thereunder.

Because of the inherent ambiguity in collective bargaining agreements most work assignment disputes probably could be resolved by an interpretation of the two agreements and an accommodation of one with the other. The jurisdiction of the Adjustment Board, however, is not limited to a resolution of only those disputes which concern the interpretation of agreements, but also extends to disputes “growing out of the * * * application of agreements,” and, in particular, also extends to the far more general coverage of “disputes * * * growing out of *grievances*” [Section 3, First (i)].

This Court in *Elgin, J. & E. Ry. Co. v. Burley*, 327 U. S. 661, 664-665 (1946), the so-called “*Second Burley Case*,” noted that:

“* * * Its [the Adjustment Board’s] expertise is adapted not only to interpreting a collective bargaining agreement, but also to *ascertaining the scope of the collective agent’s authority* beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage.”

The Board's jurisdiction has been held to include a grievance of an employee who was not even covered by a collective bargaining agreement. *Thomas v. New York, Chicago & St. Louis R. Co.*, 185 F. 2d 614, 616 (CA-6, 1950). Indeed, in *New York Central R. Co. v. Brotherhood of Locomotive Firemen*, 355 F. 2d 503, 505 (CA-7, 1966), it was specifically held that the resolution of a work assignment dispute involving a conflict between the engineers' and firemen's agreements was within the jurisdiction of the Adjustment Board.

Where a dispute grows out of "grievances" or out of the "application of agreements," the Adjustment Board has jurisdiction under the Act, and in the exercise of this jurisdiction it is obligated and empowered under Section 3, First (k) and (l) to make a "final award" as to "any such dispute." This statutory responsibility carries with it the duty to establish such procedure and exercise such authority as is necessary to meet that obligation. Despite the fact that the statute does not set out in detail what standards should be followed or what authority the Board should exercise in arriving at its "final awards," as was also the case in *N. L. R. B. v. Radio Engineers*, 364 U. S. 573 (1961), there is sound basis to "feel entirely confident that the Board, with its many years of experience" will be able to "devise means of discharging its duties" under the Act "in a manner entirely harmonious" with its other provisions. (364 U. S. at 584)

Neither *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711 (1945), nor *Southern Pac. Co. v. Joint Council*

Dining Car Employees, 165 F. 2d 26 (CA-9, 1948), supports the contention that the Adjustment Board's jurisdiction is limited to the interpretation of contracts (RLEA 8-9). The portion of the *Elgin* case (the so-called "*First Burley Case*") quoted by RLEA was concerned only with making a general distinction between "major" disputes, which "look to the acquisition of rights for the future," and "minor" disputes where "the claim is to rights accrued." That the Court in the *First Burley Case* did not intend to limit the authority of the Adjustment Board to the mere interpretation of contracts is confirmed by its specific statement in the *Second Burley Case*, *supra*, that the Board's authority was *not* limited "only to collective bargaining agreements," but also extended to "ascertaining the scope of the collective bargaining agent's authority" (327 U. S. at 664-665). Similarly, the *Southern Pacific Co.* case did not hold that the Board was limited to the interpretation of agreements (RLEA 8-9). While the court noted that the Board in the award before it had so ruled (*Id.* at p. 28), it did not accept that limitation and chose to accept instead the broader interpretation of the Board's powers in a later award and cited the above statement of this Court in the *Second Burley Case*.

Steele v. Louisville & N. R. Co., 323 U. S. 192 (1944), and *B. of R. T. v. Howard*, 343 U. S. 768 (1952), cited as indicating the Adjustment Board's inability to resolve questions of validity of agreements (RLEA 8-9), do not suggest that the Adjustment Board would not have jurisdiction to consider and resolve these work-assignment disputes by interpreting and applying the collective agreements. Those two cases simply held that the courts

had jurisdiction to consider charges by an employee that its collective bargaining representative had violated its obligation under the Railway Labor Act by reason of racial discrimination. In the *Steele* case this Court observed that the Adjustment Board "could not give the entire relief" sought in the court action because Section 3, First (i) "makes no reference to disputes between employees and their representatives [*Id.* at 205]." Similarly, the *Howard* case affirmed a right of judicial remedy in that the Adjustment Board could not afford an "adequate administrative remedy" for a violation of the Act which had thereby invalidated the contract (*Id.* at 774).

Moreover, in both *Steele* and *Howard* the Court found that the Adjustment Board's jurisdiction was not exclusive in the sense that it precluded court action. It was not suggested that it would be improper or clearly outside the scope of its jurisdiction if, on the basis of these decisions, the Adjustment Board were to rule invalid and refuse to enforce provisions of an agreement which constituted an unlawful racial discrimination. Indeed, it would be normal to expect the Adjustment Board to do so.

Neither *Switchmen's Union of N. A. v. Nat. Mediation Board*, 320 U. S. 297 (1943), nor *B. L. E. v. Missouri-K-T R. Co.*, 320 U. S. 323 (1943), indicate that the exercise of jurisdiction by the Adjustment Board over work-assignment disputes would constitute an improper invasion of the jurisdiction of the National Mediation Board (RLEA 11). The *SUNA* case simply held that the determination of representatives by the National Mediation Board under Section 2, Ninth, of the Act, was

not reviewable in the courts. The *M-K-T* case, in turn, held that the Mediation Board had jurisdiction under Section 2, Ninth, to resolve jurisdictional disputes "between unions or groups of employees" and that the courts did not have such jurisdiction. Neither case considered the jurisdiction of the Adjustment Board to resolve a work-assignment dispute between two unions which did not arise under Section 2, Ninth, but arose out of a grievance between one union and the carrier and which had been submitted to the Adjustment Board in accordance with Section 3, First (i) of the Act.

It is of course clear that a representation dispute between two unions might be submitted to the National Mediation Board under Section 2, Ninth, and that the Board would then have jurisdiction to resolve that dispute. Where, however, the dispute is framed as a grievance between one union and the carrier, the Adjustment Board properly has jurisdiction under the Act to resolve the entire dispute and make a final award. If this could be said to be an exercise of authority similar to that also assigned to the Mediation Board, then it is nevertheless an overlapping of substantive functions for different forms of proceedings which must have been contemplated.

Div. No. 14, Order of Railroad Tel. v. Leighty, 298 F. 2d 17 (CA-4, 1962), cert. den. 369 U. S. 885, was also cited by RLEA as authority for the proposition that the Adjustment Board is without jurisdiction in a work-assignment dispute. (RLEA 11) Plainly, that case does not support such a contention—indeed it supports the contrary. With respect to the statement in the *M-K-T* (or

so-called "*General Committee*") case concerning the jurisdiction of the Mediation Board over jurisdictional disputes, the Court of Appeals for the Fourth Circuit specifically noted that:

"Decisions of the Supreme Court subsequent to the General Committee cases establish that the National Railroad Adjustment Board is the forum in which jurisdictional disputes should be litigated if they depend for resolution upon an interpretation of existing bargaining agreements. See Order of Ry. Conductors of America v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946); Slocum v. Delaware, L. & W. R., 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950)." (298 F. 2d at 20, Note 5)

The court also recognized that the reference in *Howard* to the jurisdiction of the courts to determine the "validity" of a collective bargaining agreement "dealt with an agreement directly violative of the Act" and—

" * * the conclusion is inescapable that district courts have no such authority where 'validity' of the contract depends upon the merits of a representation dispute." (Id. at 20)*

In *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593, 597 (1960), this Court recognized that—

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."

D. The exercise of Adjustment Board Jurisdiction cannot be controlled by the way TCU framed the issues.

Both TCU and RLEA assume that the scope and issues of a work-assignment dispute before the Adjustment Board and the exercise of the Board's jurisdiction can be controlled simply by the careful framing of the claim presented to the Board. Thus, in this case the "Statement of Claim" (R. 5) was framed so as to make it appear that all that was involved was an alleged violation of the Telegraphers' Agreement and that money damages only were sought. The device was rejected at the district court where Judge Chilson was of the opinion that Award 9988 would involve more than a mere violation of the Telegraphers' Agreement and money damages. He cited and quoted from *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 188 F. 2d 302 (CA-7, 1951), (R. 81-82):

"* * * We can think of no employee having a more vital interest in a dispute than one *whose job is sought* by another employee or group of employees." (*Id.* at 306)

The court below also properly rejected this "horse blinders" concept, recognizing that the issues of the dispute, however framed, must be derived from a consideration of all of the facts.²³

Before this Court TCU continues its use of this device insisting that the claim which it filed with the Ad-

²³ The Court of Appeals for the Third Circuit said such a contention had an "attractive simplicity" but nevertheless rejected it as being "an unacceptable means of avoiding a jurisdictional dispute." *National Labor Relations Board v. Local 1291, International Longshoremen's Association*, 345 F. 2d 4, 8, 10 (CA-3, 1965), cert. den. October 25, 1965.

justment Board sought only "monetary compensation and not an assignment of the work [Br. 11-16]."

We believe this to be factually incorrect²⁴ but even if TCU was only seeking money damages, the ultimate objective and effect of its claim, if sustained by the Adjustment Board and enforced by the court, would result in ousting the clerical employees from the work on the IBM machines at Las Vegas.

In Award 9988, TCU made two distinct claims. In paragraph (b) of the claim, it sought a determination

²⁴ The Report of the Vice Presidents of the Order of Railroad Telegraphers (now TCU) to the Thirty-Sixth Regular and Third Quadrennial Session of the Grand Division, Miami Beach, Florida, June, 1964, contains reports of the efforts of two TCU Vice Presidents to obtain compliance by Union Pacific with Award 9988. Vice President A. O. Olson, at page 307, described a meeting held on January 4, 1962:

"The damage to our people in 8656 was also reviewed, which was caused by the facts that a prior agreement had been made that claims similar to 8656 involving a number of other points had been tied to the outcome in 8656 and had thereby adversely affected a number of offices not directly involved in the Salt Lake City claim (8656). Under these circumstances, we indicated that if in the application of 9988 the Carrier would remedy the damage caused in 8656 we would be reasonable in the matter of money reparations since our main concern was to preserve for our people the work that rightfully belonged to them." (Note: The reference to "8656" is the prior award of the Adjustment Board in this matter, *supra*, p. 8.)

TCU Vice President R. J. Woodman tells of a meeting on December 3, 1963 (which was after TCU had filed this enforcement action):

"After considerable discussion on all angles of the Award, Attorney Wilcox asked if we had any suggestions that Management could consider in reaching a settlement in the instant case. We told him that the employees were very disturbed over the loss of jobs in the telegraphers' ranks and that we must have some form of job stabilization on this property. We emphasized that carrier must give consideration to job stability and the protection of the rights of telegraphers to perform all work that has been traditionally and historically performed by telegraphers on this property. We further demanded that management agree to conduct a joint check on the property to be made by General Chairman Herrera and a responsible representative of the carrier at all communication points on the property to determine the proper work as between clerks and telegraphers. We stressed the fact that only by a joint check at all locations could a proper understanding be reached as to the work involved, and who should perform the work." (p. 131)

that Union Pacific was violating the Telegraphers' Agreement "when it requires or permits other than those covered by said agreement" to perform the particular work functions involved, and in paragraph (c) it asked money damages "for each 8-hour shift, both day and night, since August 25, 1952 [R. 5]." The record shows that TCU did in fact ask that the work "be properly assigned to telegraph service employes [R. 7]." The Adjustment Board sustained both claims (b) and (c) "as stated in the Opinion [R. 51]." Moreover, in the Adjustment Board's opinion it was stated that—

"* * * Tape-producing machines activated by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher.

"The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office." (R. 50)

Thus, in sustaining claim (b), the Board ruled that this work may not be performed by Clerks but must be performed by a telegrapher and, in sustaining (c), that the Carrier should pay continuing damages for each day that the alleged violation continues, i. e., until the violation be corrected by assignment of the work to a telegrapher (R. 51).

The order of the Adjustment Board required Union Pacific:

"* * * to make effective Award No. 9988 made by the Third Division of the National Railroad Adjust-

ment Board * * *; *and if the Award includes a requirement for the payment of money, to pay to the employe (or employes) the sum to which he is (or they are) entitled under the Award * * *.*" (R. 71)

In its complaint TCU requested the district court to—

" * * make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce the Award and Order referred to in Exhibit 1 hereof, and requiring the defendant to make an accounting to the plaintiff of all monies due under the aforesaid Award and Order * * *."* (R. 4)

A writ of mandamus is an inappropriate remedy to enforce a claim for money damages and could only have had reference to enforcement of the other portion of the Award relating to the determination that a telegrapher instead of a clerk must be used to perform the work.

In *Hunter v. Atchison, T. & S. F. Ry. Co.*, 171 F. 2d 594, 597 (CA-7, 1948), the court said:

*"It is also true, as argued by the brakemen, that the Award under attack does not directly take the work from the porters and give it to the brakemen, But the effect is precisely the same as though the Award had done so in express terms. * * *"*

Similarly, in *Allain v. Tummon*, 212 F. 2d 32 (CA-7, 1954), while the claim sought money damages only, the court still said that:

" * * in presenting its claim to the Board the Brotherhood was in effect asking that the plaintiffs be replaced by dining car stewards * * *."* (p. 36)

Recently, the U. S. District Court for the Eastern District of Wisconsin, in *Brotherhood of Railroad Train-*

men v. Chicago, Milwaukee, St. Paul and Pacific R. Co., dated August 17, 1966, and reported unofficially at 62 L. R. R. M. 2828, enforced an award of the First Division where the railroad had paid the money damage claims but had declined to assign the work to the successful claimants. The award involved was First Division Award No. 20038 (149 N. R. A. B. (1st Div.) 322). The claim did not seek an assignment of work—only monetary penalties.

It was held that—

“Implementation of the award as required by the order of the Board necessarily calls for assignment of the bleeding job to employees represented by plaintiff in addition to the payment of monetary claims.”

TCU's highly unrealistic position that it was just seeking money damages rather than assignment of the work must be summarily rejected. Faced with the monetary penalty of paying telegraph employees for not performing the work and also the clerical employees for performing it, it is clear that Union Pacific would inevitably be compelled to transfer such work from clerks to telegraphers. Certainly the liability for a double monetary penalty for not assigning the work to employees represented by TCU would be just as effective in coercing the taking of that work from the clerks as a direct order of the court or the Adjustment Board.

A choice of duplication of job assignments or “feather-bedding” payments by an employer is not considered an acceptable means of avoiding or settling a jurisdictional dispute and justifies the conclusion that the union's real purpose is to compel the employer to assign the par-

ticular work to its own members rather than the members of another union. *International Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, 335 F. 2d 216, 221-222 (CA-9, 1964), cert. den. 379 U. S. 999 (1965); *National Labor Relations Board v. Local 1291, International Longshoremen's Assn.*, 345 F. 2d 4, 9-10 (CA-3, 1965), cert. den. 382 U. S. 891 (1965).

E. "Overlapping contracts" assigning the same work to different groups of employees are not possible under national labor policy.

Implicit in the position of both TCU and RLEA is the erroneous assumption that in these work-assignment disputes the railroad has bound itself by "overlapping contracts" to both TCU and BRC. (Br. 12; RLEA 14) It is argued that both unions could have a contractual right to the same work and thus each union's claim of work right should be decided solely in the context of that union's contract. The court of appeals below rejected such an argument and correctly recognized that this was not a case of "overlapping" or inconsistent contracts, that only one of the two competing unions could have the lawful right to claim a given work assignment, and that the Board's function was to resolve the entire dispute (R. 94). While inconsistent contracts are possible at common law, this is not the situation under the national labor policy. See *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 456-457 (1957), and *Labor Board v. Radio & Television Broadcast Engineers Union*, 364 U. S. 573 (1961).

We submit that neither of Union Pacific's contracts with TCU or BRC can be viewed as ordinary contracts

governed by common law concepts. Collective labor agreements are not ordinary contracts and to apply commercial contract law to these would lead to absurd results. Thus, in *John Wiley & Sons v. Livingston*, 376 U. S. 543, 550 (1964), Mr. Justice Harlan speaking for a unanimous court stated:

"* * * While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. '... [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.' *Warrior & Gulf, supra*, at 578-579 (footnotes omitted). Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, see *id.*, at 580, and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate, as we have said, *supra*, pp. 546-547, must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy."

While the court was dealing with the question of a suc-

cessor corporation and the collective bargaining agreement of the predecessor, the rationale in *Wiley* is controlling here.

Amicus RLEA has itself recognized that the "strict principles of commercial contract law and the common law of master and servant" are not appropriate guidelines in this area. Brief for RLEA as *Amicus Curiae*, p. 12, *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965).

Railroads no longer have the right to treat with or contract with respect to a given subject matter with whomever they might otherwise choose. Under Section 2, Ninth, once a collective bargaining representative is selected to represent employees performing a given classification of work, the railroad is obligated to treat only with that representative for all purposes of collective bargaining.

As RLEA recognizes (RLEA Br. 16), this section "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 548 (1937); *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks, et al.*, 281 U. S. 548 (1930).

The extent to which any union can bargain for the right to perform work is limited by the scope of its capacity as representative. Thus, a union has no right to demand and insist that an employer expand the bargaining

unit to include additional work, *N. L. R. B. v. Local 19, International Bro. of Longshoremen*, 286 F. 2d 661 (CA-7, 1961), cert. den. 368 U. S. 820; *U. S. Pipe and Foundry v. N. L. R. B.*, 298 F. 2d 873 (CA-5, 1962), cert. den. 370 U. S. 919. Under both labor acts, conflicting individual contracts with employees who are represented collectively are not enforceable. *J. I. Case Co. v. Labor Board*, 321 U. S. 332 (1944); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342 (1944).

An employer can properly negotiate and enter into an agreement covering the right to perform certain work only with the true representative of the group whose craft line encompasses that particular work. Where one craft representative has successfully secured recognition and contractual rights to a given class of work, no agreement with a different representative or group of employees covering that same work would be valid. This restriction on the common law concept of freedom of contract, which is so vital to the national labor policy, does not impinge upon constitutional guarantees. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 558-559 (1937).

In *General Committee, B. L. E. v. M-K-T R. Co.*, 320 U. S. 323 (1943), BLE argued that it had the exclusive right to bargain with M-K-T with respect to work falling within that craft, engineers' work, and that an agreement with BLF&E concerning use of firemen as engineers was void. BLE's argument was summarized by the court as follows:

"* * * Thus it is argued that the reasons which support the holding in the *Virginian Ry. Co.* case that the right of majority craft representation is exclusive

also suggests that Congress intended to write into the Railway Labor Act a restriction on the rules and working condition concerning which the craft has the right to contract. It is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian Ry. Co.* case (300 U. S. p. 548) that the Act imposes upon the carrier 'the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' That expresses the basic philosophy of § 2, Ninth. * * * (Id. at 335)

This Court ultimately held that the resolution as to which union had the right to contract for this work was not justiciable by a court, but did not impair its prior recognition that under the Railway Labor Act only one of those two competing unions had the right to contract for any particular work.

Moreover, it must be remembered that we are not here dealing with specific contractual grants of work as such. The scope rules of railroad contracts, and TCU's here, do not list any specific work items but simply list positions. The Adjustment Board must of necessity interpret the agreement against the background of custom, usage and practice in the industry. Any alleged exclusive grant of work is necessarily based on the construction, interpretation and application placed upon these general provisions by the Board. Since a direct unambiguous assignment of the same work to two unions is inconsistent with the national labor policy, such a double assignment cannot be derived from the interpretation of the type of ambiguous contract involved here.

Under the Railway Labor Act, therefore, a railroad cannot enter into duplicating or "overlapping contracts" with respect to the same work. It can only properly and validly contract with the representative which is entitled to represent employees performing that particular type of work and no other. The suggestion that an employer might be equally bound under its contracts with both the competing unions has been and must be rejected as contrary to the national labor policy. *Labor Board v. Radio & Television Broadcast Engineers Union*, 364 U. S. 573 (1961); *International Bro. of Carpenters v. C. J. Montag & Sons*, 335 F. 2d 216 (CA-9, 1964), cert. den. 379 U. S. 99.

F. Neither the divisional arrangement nor the bipartisan structure of the Adjustment Board impairs the exercise of jurisdiction over both parties to an interunion work-assignment dispute.

The establishment of the Adjustment Board with four independent divisions is urged by TCU and RLEA (Br. 19-20; RLEA 12-13) as indicating that Congress did not intend that it have jurisdiction over "jurisdictional disputes." The basic contention is that since each division has exclusive jurisdiction over disputes involving the type of employees assigned to it, in the event a dispute arose between employees whose work was assigned to different divisions there allegedly would be no way that such a dispute could be resolved. This problem is not presented here.

Under the Act, divisional jurisdiction is not predicated upon either the craft of the employees claiming the

work nor on what those employees claim is the nature of the disputed work, but rather upon the real nature of the work which is involved in the dispute. This Court has said that divisional jurisdiction of the Adjustment Board under the Railway Labor Act is grounded—

“* * * on a craft or job classification irrespective of the labor organization representing the particular employees involved.” *Order of Railway Conductors v. Swan*, 329 U. S. 520, 528 (1947).

Therefore, the hypothetical situation suggested by TCU (Br. 19-20) with respect to employees represented by the Brotherhood of Railroad Signalmen (whose duties normally fall within the Third Division) claiming work assigned to employees represented by the International Brotherhood of Electrical Workers (whose duties normally fall within the jurisdiction of the Second Division), would not present any unresolvable dilemma. The Third Division would not have “exclusive jurisdiction” over the dispute simply because the work was claimed by the Signalmen’s union any more than the Second Division would have jurisdiction because it was performed by employees who were members of the Electrical Workers’ union. Divisional jurisdiction would depend upon the nature of the disputed work, itself, and not the affiliation of either of the claimants.

In any event, whichever division was ultimately determined to have jurisdiction over the disputed work, it would still not preclude that division from considering and protecting the interests of all parties, including a union which might normally represent employees performing work subject to a different division. There is no divi-

sional limitation in Section 3, First (j) with respect to the giving of notice to all parties "involved" in a dispute, and there would be no purpose nor reason for such notice unless such parties were entitled to have their interests considered and protected without regard to the fact that they might normally represent employees whose duties fell within the jurisdiction of a different division.

The courts have had little difficulty in resolving any such problems. Thus, in *Brotherhood of R. R. Trainmen v. Templeton*, 181 F. 2d 527 (1950), one of the cases referred to by TCU as an example (Br. 20), express messengers who were represented by the BRC (and whose duties normally fell within the scope of Third Division jurisdiction) successfully voided certain awards of the First Division holding that some of their duties exclusively belonged to baggagemen represented by BRT (which work was within the scope of First Division jurisdiction) because notice had not been given to the express messengers or BRC under Section 3, First (j). In a subsequent action by BRT to require the First Division to reopen and again consider its claims in those voided awards, the court in *Brotherhood of R. R. Trainmen v. Swan*, 214 F. 2d 56 (CA-7, 1954), ordered that the First Division should reopen these cases, but specified that proper notice be given to the express messengers and that in the Board proceedings the express messengers would be entitled to full participation and that they "may defend on the merits as though they were original parties [p. 59]." The court further indicated that in this proceeding, despite the fact that disputes involving these contending unions normally came within the scope of differ-

ent divisions, the First Division nevertheless had a "duty to determine the rights of the contending parties [p. 59]"²⁵

TCU also contends that the fact that the Adjustment Board was established as a bipartisan organization under Section 3, First (a) would in effect permit the carriers to decide which craft should perform the work because allegedly the representative on the Board of that selected craft would vote with the carriers and against the claiming union (Br. 20-21; RLEA 16). If any such possibility exists, however, it is not because of the requirements of the statute but rather is a result of the unions' choice of a method of selecting and designating the responsibility of the labor members on the Adjustment Board.

The Railway Labor Act contains no suggestion that Congress intended that the labor representatives on the Adjustment Board should act solely in the interests of one individual union without regard to the merits of the controversy or, at least, the collective interests of the labor unions involved. Section 3, First (a) simply provides

²⁵ *Seaboard Air Line R. Co. v. Castle*, 170 F. Supp. 327 (DC-Ill., 1958) and *Union Railroad Co. v. National Railroad Adjustment Board*, 170 F. Supp. 281 (DC-Ill., 1958) were cited by RLEA to show that some question has arisen in the lower courts as to the scope of divisional jurisdiction of the Board (RLEA 12). Neither case, however, purports to hold that the divisional separation of the Board would preclude one division from considering the interests and agreement of employees subject to another. On the contrary, the court in the *Seaboard* case expressly held that the divisional arrangement of the Board would not impair consideration of the interests of other employees under another division, stating:

"The court is of the opinion the statutory language used to define the jurisdiction of the divisions by crafts or classes or employees cannot be held by implication to exclude other crafts or classes where a dispute of their own craft or class will necessarily affect another class or craft whose rights would be considered." (*Id.*, at 330).

that labor members of the Adjustment Board would be selected—

“* * * by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this act.”

Section 3, First (c), then confers upon such “national labor organizations,” as a body, the right and duty to—

“* * * prescribe the rules under which the labor members of the Adjustment Board shall be selected, and shall select such members and designate the division on which each member shall serve * * *.”

Under such circumstances, where labor representatives are called upon to represent various groups of employees whose interests may at times be divergent or conflicting, such representatives are under an obligation to represent all such groups of employees fairly and impartially. While they are necessarily entitled to exercise discretion in determining what is best for the group as a whole, the exercise of such discretion is subject always to complete good faith and honesty of purpose. *Humphrey v. Moore*, 375 U.S. 335 (1964). It would be a violation of the duty of fair representation for such a representative to intentionally prefer or discriminate in favor of one particular group of employees. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944).

If, in exercising its privileges of self organization under Paragraphs (a) and (c) of Section 3, First, the national railroad labor organizations have established procedures for selection of labor members of the Ad-

justment Board and rules governing their conduct which would permit or encourage such a labor member to exercise his authority solely as the representative and in the self-interest of a particular union, this is a result, not of the statute, but of their own making and is subject to correction by them if that be necessary or desirable from their standpoint.²⁶

That the national railroad labor organizations are fully capable of making changes in their methods of selection and control of labor members of the Adjustment Board is amply demonstrated by their ability through policy agreements to hold the labor members of the Board to block voting and unified action, even in cases where it might not be in the interest of some individual union. See Findings of Fact No. 64, 156-158, in the *M-K-T* case which are attached as Appendix B, *infra*, p. 18a.

They were also able to jointly agree on the alteration of that policy whereby labor members would vote to give the statutory notice required by Section 3, First (j), but each organization receiving such notice would decline to participate by the agreed standardized letter. (See Appendix C, *infra*, p. 21a) There is no reason to believe that the labor unions would not be capable of effecting similar changes if necessary to prevent the type of situation which both TCU and RLEA purport to fear.

This would also be the case as to TCU's rather hysterical and highly hypothetical example (Br. 21) that a railroad could avoid its "bargaining obligations" under

²⁶ This is what happened on the Third Division when a labor member voted with the carrier members. See Findings of Fact Nos. 60-62, *M-K-T R. Co. v. N. R. A. B.*, 128 F. Supp. 331, 343.

Section 6 by agreeing to assign the work to both demanding groups and await resolution in its favor by the Adjustment Board. Of course, such an action, if it ever did occur, which we doubt, would be a most flagrant violation of the railroad's duties under Section 2 of the Railway Labor Act. But, more important to our consideration is that TCU overlooks the fundamental fact that the railroad could not lawfully bargain with *two* unions over the assignment of the same work. *Virginian Railway v. System Federation No. 40*, 300 U. S. 515 (1937). And, moreover, one of the two Section 6 demands for the assignment of the work would be clearly outside of Section 6. *Southern Pacific Company v. Switchmen's Union of North America*, 356 F. 2d 332 (CA-9, 1965) *affd.* on reh. 356 F. 2d 336; *Order of Railway Conductors & Brakemen v. Switchmen's Union of North America*, 269 F. 2d 726 (CA-5, 1959), *cert. den.* 361 U. S. 899.

G. Nothing in the Railway Labor Act, the structure of the Adjustment Board nor Section 10(k) of the National Labor Relations Act negates the jurisdiction of the Adjustment Board over work-assignment disputes.

1. **Section 3, first (i) and (j) contemplate that the Adjustment Board would have jurisdiction to consider and resolve inter-union work-assignment disputes.**

TCU contends that under Section 3, First (i), the jurisdiction of the Adjustment Board is limited to deciding the dispute which it filed between itself and Union Pacific and that the Board's jurisdiction did not extend to a consideration of the rights of the Clerks which were not the subject of any dispute with Union Pacific and

which had not been handled nor filed as a dispute with the Board (Br. 16-18). TCU confuses the question of what disputes may be filed with the Adjustment Board with what the Board may properly include in its consideration and decision of such dispute.

Section 3, First (i), specifies the types of disputes which may be filed with the Adjustment Board and requires as a condition precedent to the *invocation* of the Board's jurisdiction that the dispute—

¶ be one "between an employee or group of employees and a carrier or carriers";

¶ be one "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions"; and

¶ has been previously "handled in the usual manner" with the Carrier.

The immediately following paragraph (j) of Section 3, First, then specifies that the Board—

"* * * shall give due notice of all hearings to the * * * employees * * * involved in any disputes submitted to them."

Paragraphs (k) and (l) then require that—

"* * * final awards as to any such dispute must be made * * *"

either by the appropriate division as originally constituted or, if necessary, with the addition of a neutral referee.

We do not suggest, as TCU infers, the Adjustment Board would, in the first instance, have jurisdiction to

consider a work assignment dispute which was framed as being *entirely* between two unions. In that form, such a dispute would probably be within the jurisdiction of the Mediation Board under Section 2, Ninth. *General Committee, B. L. E. v. Missouri-K-T R. Co.*, 320 U. S. 323, 336.

In this case, however, TCU framed the dispute as one between itself and the Carrier and, as such, the dispute was one which properly invoked the jurisdiction of the Adjustment Board. The form in which TCU framed its claim, however, did not change the basic reality that it actually involved an attempt by TCU to exert jurisdiction over work assigned to employees represented by BRC. *National Labor Relations Board v. Local 1291, International Longshoremen's Assn.*, 345 F. 2d 4,8-10 (CA-3, 1965), cert. den. 382 U. S. 891 (1965). Under Paragraph (j) of Section 3, First, therefore, BRC was "involved" in the dispute and, upon being afforded proper notice, its interest also became a proper subject of the Board's jurisdiction.²⁷ The Adjustment Board here must have recognized this when it gave BRC notice of the proceedings (R. 75). BRC thereby became a full party to the proceedings with respect to the dispute and its interests therein came within the jurisdiction of the Board. Indeed, there would be absolutely no reason for requiring and giving the notice to other "involved" parties unless their interest in the dispute was within the jurisdiction of the Board.

²⁷ *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946); *Slocum v. Delaware, L. & W. R.*, 339 U. S. 239 (1950); *Brennan v. Delaware, L. & W. R. R.*, 303 N. Y. 411, 103 N. E. 2d 532 (N. Y., 1952), cert. den. 343 U. S. 977 (1952).

The fact that there was no existing dispute between BRC and Union Pacific and, accordingly, that there had been no handling of such "in the usual manner" did not affect the Board's jurisdiction over their interest. The requirement that there be such a "dispute" which had been "handled in the usual manner" affects only the *invocation* of the Adjustment Board's jurisdiction under Section 3, First (i). Once that jurisdiction attaches it also carries with it jurisdiction under Section 3, First (j) to consider and determine the interests of any other "involved" parties to the extent necessary for the Board to fulfill its obligation under Section 3, First (k) and (l) to make "final awards as to any such dispute."

2. **The differences in Section 10(k) of the NLRA and the structure of the NLRB do not negate the congressional intent that the Adjustment Board should also have jurisdiction to adjudicate work-assignment disputes.**

TCU contends that the specific provisions in Section 10(k) with respect to deciding jurisdictional disputes and the allegedly more desirable structure in the NLRB for the handling of such disputes indicates that Congress did not intend that the Railway Labor Act vest such jurisdiction in the Adjustment Board (Br. 25-26)

The fact that in Section 10(k) the NLRB was specifically directed to hear and determine jurisdictional disputes does not indicate that the prior and more general language of the Railway Labor Act did not also confer similar jurisdiction upon the Adjustment Board. The legislative history of 10(k), in fact, indicates that in providing for this procedure to avoid strikes over jurisdic-

tional disputes, Congress was but following the lead of the Railway Labor Act. At the time the House of Representatives was considering the report of the conference committee on the bill which included what is now Section 10(k), Representative Gerald W. Landis, a member of the conference committee, indicated the purpose of this legislation, in part, as follows:

"This conference report will take care of labor abuses without destroying labor's rights. It completely outlaws *jurisdictional strikes*, wildcat strikes and secondary boycotts. However, these are labor evils and abuses and not labor rights.

"In order to stop the strikes which threaten the health and welfare of the Nation *we have set up a plan in many ways, like the Railway Labor Act*. It is a plan to bring the two sides together without harming labor, management, or the public." (93 Cong. Rec. 6386)

The claimed superiority of the NLRB over the Adjustment Board with respect to the ability to go beyond the interpretation of contracts, and its being a single, non-partisan board, not only does not exist, but would be of no significant importance if it did. In *National Labor Relations Board v. Radio & Television Broadcast Engineers Union*, 364 U. S. 573 (1961), it was also argued that the NLRB was not the type of tribunal to which Congress would have entrusted the resolution of jurisdictional disputes, but that these disputes would be more appropriately handled by arbitration.²⁸ This Court, however, re-

²⁸ Inasmuch as this Court has held the Adjustment Board to be a form of arbitration, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 39 (1957), *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U. S. 33, 40 (1963), presumably the NLRB, as appellant in the *Radio Engineers* case, would have felt that the Adjustment Board would be an even more appropriate tribunal for the settlement of jurisdictional disputes than itself.

jected these arguments, stating—

“* * * But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.” (p. 583)

Despite the potential procedural difficulties which were urged in opposition to the NLRB's resolving such dispute, the Court expressed confidence that the Board “with its many years of experience” would “devise means of discharging its duties” under the Act. Similar conclusions would also be appropriate in the case of the Adjustment Board.

II. BRC WAS AN INDISPENSABLE PARTY TO TCU'S ACTION TO ENFORCE ADJUSTMENT BOARD AWARD 9988.

The district court dismissed this action upon TCU's refusal, after being afforded an additional opportunity by the district court (R. 85), to join BRC as an indispensable party (R. 88). The indispensability issue was presented by both parties on appeal. In affirming the dis-

missal, the court of appeals did so on alternate grounds: first, because the Adjustment Board had failed to properly exercise its primary jurisdiction and, second, because of the absence of an indispensable party.

TCU only indirectly discusses this alternative holding and appears to be of the opinion that the court below did not consider the indispensable party issue (Br. 5).²⁹ In any event, however, the judgment of the court of appeals is fully supported because of TCU's failure to join an indispensable party.³⁰

Much latitude is given to employees in actions to enforce Adjustment Board awards under Section 3, First (p) of the Railway Labor Act; nevertheless, it is required that such actions "proceed in all respects as other civil suits." The requirements in the Federal Rules as to indispensable parties are applicable.³¹

The definition as to what parties are indispensable is expressed in the much-cited case of *Shields v. Barrow*, 21 U. S. 409, 411, 17 How. 130, 139 (1854):

"* * * Persons who not only have an interest in the controversy, but an interest of such a nature that

²⁹ *Amicus* RLEA does not discuss the indispensable party issue at all.

³⁰ *Langnes v. Green*, 282 U. S. 531, 538-539 (1931); *U. S. v. American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924); *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U. S. 237, 239 (1935).

³¹ Rule 19 of the Federal Rules of Civil Procedure was amended effective July 1, 1966, after the date of the court of appeals' decision in this case. (Appendix A, *infra*, p. 16a.) According to the Advisory Committee Notes, the list of factors which the Rule specifies should be considered in determining whether an action should be dismissed because an interested person cannot be made a party are merely "relevant considerations drawn from the experience revealed in the decided cases." It has been suggested therefore that while amended Rule 19 may offer "a clearer guide" to the courts, it "does not make any basic change in substance." 3 Moore, *Federal Practice* (1966 Special Supplement), pp. 19, 21.

a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The tests to be applied are detailed in *Washington v. U. S.*, 87 F. 2d 421, 427 (CA-9, 1936). The court also pointed out that "the nonjoinder of an indispensable party is fatal error, and the court cannot proceed to a decree in the absence of such indispensable party [p. 428]."

TCU has not disputed the applicability of the traditional tests of indispensability of parties to an enforcement action under the Railway Labor Act. *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F. 2d 59, 67 (CA-8, 1956), cert. den. 350 U. S. 997 (1956). TCU simply argues that BRC is not indispensable.

A. BRC has a real and substantial interest which could be directly affected by this case.

1. **Enforcement of award 9988 as sought by TCU would require a transfer of work from clerks to telegraphers.**

This point has been discussed under Part I, D. See page 44, *supra*.

2. **The clerks have a substantial interest in any action which could deprive them of work.**

Since clerical employes are now performing the work, over and above any actual enforceable right they might have to such work, they have at least what might

be termed a "possessory interest" therein which could be directly affected by this litigation. This interest is a substantial one and is entitled to protection. *Truax v. Raich*, 239 U. S. 33 (1915). *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. 2d 527 (CA-8, 1950); *Hunter v. Atchison, T. & S. F. Ry. Co.*, 171 F. 2d 594 (CA-7, 1948), and *Allain v. Tummon*, 212 F. 2d 32 (CA-7, 1954).

In any event, even enforcement of Award 9988 limited to the money portion alone would still have a declaratory effect which could substantially impair the opportunities and rights of clerical employees to the performance of this work in the future. Such an order would have the effect of a declaratory judgment as to the right of telegraphers to perform this work. The fact that such an order would not be binding upon parties not included in the action, still could have such an effect as to require their presence in the proceeding. Under somewhat similar circumstances, it was stated in *Green v. Brophy*, 110 F. 2d 539, 543 (CA-D. C., 1940):

"* * * We do not here find it necessary to pass upon the question of whether such decree would be res adjudicata against the union and its former membership in respect to their legal relationship to the defendant, or their claims to the funds in question, for that is not decisive of the status of the union or its former membership as indispensable parties. See *California v. Sou. Pac. Co.*, *supra* [157 U. S. 229, 255]. It is sufficient to note that such a decree would plague the union or its former members in any subsequent suit against either the defendant or the plaintiff in respect of these funds."

We have already referred to *Order of R. R. Telegraphers v. New Orleans T. & M. Ry.*, 229 F. 2d 59 (CA-8, 1956), cert. den. 350 U. S. 997, where the Court of Appeals for the Eighth Circuit affirmed the dismissal of an enforcement action brought by TCU to enforce an award of the Adjustment Board sustaining its claim to certain work performed by employees represented by BRC both because the latter had not been given proper notice of the Adjustment Board proceedings and because it had not been made a party to the enforcement action.

"* * * It is well settled that a Federal Court will not proceed to final decision of a controversy brought before it without the presence of all 'who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' (cases cited) Rule 19 of the Federal Rules of Civil Procedure, 28 U.S.C.A. has not modified the requirement as to indispensable parties * * * and the undisputed facts in this case demonstrate that the Clerks are indispensable parties without whose presence justice cannot be done." (p. 67)

TCU discusses the *N. O. T. M.* case at some length (Br. 13-16) as expressing the view that the "relief sought before the Adjustment Board in disputes similar to that involved in this case is of importance in determining whether the presence of other parties before the Adjustment Board and the court is required [Br. 13]." TCU would distinguish that case, first, because in *N. O. T. M.* both Clerks and Telegraphers had in fact specifically claimed the work whereas here only TCU has specifically

done so; and, second, because in that case the assignment of the work was specifically sought by TCU whereas here only monetary compensation was sought (Br. 15-16). These differences, TCU argues, renders the *N. O. T. M.* case inapposite here.

Whether or not BRC had filed a claim to the work involved is certainly not a required element to its being an indispensable party to this enforcement action. Of course, no claim has been filed by BRC because clerical employees are performing the work and have not yet been dispossessed. This does not, however, suggest that it has no interest in this work. It is the actual interest in the work, and not the formal expression of that interest, which forms the basis of indispensability.

Nor does it follow that merely because the BRC has not filed any formal claim to this work that there was no evidence of its interest therein. In addition to the obvious possessory interest, previously discussed, BRC formally advised the Adjustment Board and Union Pacific that if work were taken from employees represented by BRC, it would proceed against Union Pacific to reclaim the work (R. 77).

It should also be noted that in the prior Third Division Award No. 8656 (83 N.R.A.B. (3d Div.) 337), between these same parties and involving the same dispute, it had previously been held that this identical work was properly assigned to and performed by Union Pacific's clerical employees (R. 49). The Clerks might well have premised a claim of a right to perform this work under that prior award.

Moreover, while in the *N.O.T.M.* case the Clerks had not been given any notice of the Adjustment Board proceedings, in this present case, the Board had already found that the Clerks were "involved" in the dispute under the provisions of Section 3, First (j) and BRC was in effect made a party to the proceedings in recognition of their interest. This particular factual difference with the *N.O.T.M.* case would reinforce the applicability of the *N.O.T.M.* decision, and afford an even greater reason for the conclusion that BRC was indispensable to this enforcement proceeding.

When the already close parallel of facts in the *N.O.T.M.* case is considered together with the other decisions on the requirements of indispensability, its independent holding that BRC was an indispensable party clearly supports the similar conclusion in this case.

B. The limitations of the *Gunther* case and P. L. 89-456 do not affect BRC's indispensability.

TCU argues (Br. 34) that inasmuch as the Adjustment Board had jurisdiction to rule on the dispute presented by it, Award 9988 should, therefore, be enforced since "[n]o other defect is alleged or can be made the basis of attack on the Award," citing *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U. S. 257, 15 L. ed. 2d 308 (1966), and P. L. 89-456 (80 Stat. 208, approved June 20, 1966), *infra*, p. 12a.

Both decisions below were rendered prior to this Court's decision in *Gunther* and the enactment of P. L. 89-456. However, neither *Gunther* nor P. L. 89-456 con-

templated that the District Court in an enforcement action would be limited to adjudicating matters having to do with the jurisdiction of the Adjustment Board.

This Court's decision in *Gunther* was limited to a holding that the Railway Labor Act, prior to P. L. 89-456, did "not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award." (15 L. ed. 2d at 313). But this Court did not suggest that the district court would not have jurisdiction to adjudicate other "non-merit" issues concerning the validity or enforceability of the award.

Public Law 89-456 precludes a review of the merits of an Adjustment Board Award in an enforcement action. But Section 2(e) still preserves the jurisdiction of the district court to adjudicate and take appropriate action, among other things, "for failure of the division to comply with the requirements of [the Railway Labor] Act."

Thus, had BRC been properly joined it could have raised and had adjudicated any position it might have with respect to whether the procedure and other conduct of the Adjustment Board was in compliance with the provisions of the Railway Labor Act.³²

The most obvious issue on which BRC has a right to be heard and adjudicated is that which is discussed in Section I of this brief, i. e., whether the Adjustment

³² There is, of course, in any enforcement action the "crucial question" as to whether the award sought to be enforced was validly made. *Elgin, J. & E. Ry. Co. v. Burley*, 325 U. S. 711, 720 (1945).

Board acted improperly in failing to consider BRC's interest in the dispute. Other matters, which have not been litigated but which would be proper issues and which BRC would have the right to raise, argue and have adjudicated in the enforcement action even under the recent amendments are:

¶ Whether under Section 3, First (m) the Adjustment Board's prior Award No. 8656, covering the same dispute between the same parties, was "final and binding" and thus precluded the contrary decision in its present Award 9988.

¶ Whether the notice given BRC by the Adjustment Board as to the pendency of TCU's claim was sufficient under Section 3, First (j) to properly apprise BRC of the real nature and potential effect of an award on such claim.

There are also other potential issues affecting BRC's interests which could arise in the enforcement proceeding which it might wish to oppose or dispute from a defensive standpoint. These issues have already developed in these proceedings, raised by both TCU and Union Pacific:

¶ TCU has intimated that BRC, by failing to participate in the Adjustment Board proceedings, in effect waived any interest it may have had to the work involved.

¶ Union Pacific has contended that even though BRC chose not to participate in the Adjustment Board proceedings, it would, if properly noticed, still be bound by the award. (See the court of appeals'

first opinion reported unofficially at 59 LRRM 2993, 2996.)

¶ Despite the request in the complaint that the award be enforced "by writ of mandamus or otherwise" (R. 4), TCU has contended that it actually seeks only money damages (Br. 12). BRC would seem to have an enforceable interest in avoiding any construction of the award or the issuance of any judgment directing that the work itself be performed by telegraphers rather than clerks.

Of course, it is not known what issues or positions BRC would actually have raised if it had been made a party to the action, nor should it be inferred that Union Pacific would necessarily agree that all of the above positions or others which might have been advanced by BRC would in fact have been valid. Such positions and perhaps others, however, are ones which BRC might reasonably have taken in its own interest, and are ones which the district court would have jurisdiction to consider and rule upon in the enforcement action even under *Gunther* and the recent amendments.

C. BRC's presence in the enforcement action was necessary to protect Union Pacific in its compliance with any decree or judgment.

From Union Pacific's standpoint, whatever position or issue BRC may have sought to have adjudicated if it had been made a party in the enforcement action is not so important. It is important, however, that BRC be a party to the enforcement action in order to assure that BRC would be bound and Union Pacific protected in its

subsequent compliance with any judgment or decree of the district court.

Where, as here, a union claims the exclusive right of employes it represents to work performed by employes represented by another union, the railroad-employer has the right under Section 3, First (j) that the union representing the other employes be made a party to the Adjustment Board proceedings in order to assure that any such decision would be *res judicata* and binding upon all parties. *Allain v. Tummon*, 212 F. 2d 32, 36 (CA-7, 1954); *Kirby v. Pennsylvania R. Co.*, 188 F. 2d 793, 799 (CA-3, 1951).

In the *Kirby* case, which was an enforcement action, it was held that the railroad had the right to raise the question of failure of such other parties to be given notice and to be able to participate in the Board action in order to assure itself of protection should it be compelled to comply with the award. It was there stated:

"If the carrier is not permitted to raise the question of notice to employees, it is in a dilemma in deciding whether to comply with a Board order. If it complies, it may be exposed to suit by the ousted employees for back pay and reinstatement. If it refuses to comply it may increase the amount of back pay owed the claimants. Either way it runs the risk of paying two groups of employees for the same work.
* * *

"* * * We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. *A party is entitled to an award that will protect it in the event that it complies.*" (pp. 798-799)

A fortiori, the railroad is entitled to the same right in an enforcement action where the court has been asked to compel compliance.

The fact that, in the absence of a party, the adjudication would not bind it or prevent it from relitigating the controversy, is an important consideration in holding that such absent party is indispensable to the action. *Shields v. Barrow*, 17 How. 130, 139 (1854); *State of California v. Southern Pac. Co.*, 157 U. S. 229, 255 (1895); *Fitzgerald v. Haynes*, 241 F. 2d 417, 419 (CA-3, 1957).

CONCLUSION

For the reasons and authority set forth above, the decision and judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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October 1, 1966

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APPENDIX A

Relevant Statutory Provisions

1. THE RAILWAY LABOR ACT

Being an act to provide for the prompt disposition of disputes between carriers and their employes and for other purposes.

(Pub. No. 257, 69th Cong., approved May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., approved June 21, 1934, 48 Stat. 1185, 45 U. S. C., ch. 8, sec. 151, et seq.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

• • • • •

GENERAL PURPOSES

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

* * * *

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

* * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after

the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall desig-

nate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

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Section 3.

NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

• • • • •

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, cler-

ical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

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(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award

includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional

boards shall be designated in keeping with the rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board. * * *

* * * * *

Section 5.

FUNCTIONS OF MEDIATION BOARD

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

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2. THE NATIONAL LABOR RELATIONS ACT

AN ACT

To Amend the National Labor Relations Act,
to Provide Additional Facilities for the
Mediation of Labor Disputes Affecting

Commerce, to Equalize Legal Responsibilities of Labor Organizations and Employers, and for Other Purposes.

(Public Law No. 101, 80th Congress of the United States, Chapter 120, First Session, H. R. 3020, Passed June 23, 1947, over the President's Veto.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

• • • • •

Section 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • •

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

• • • • •

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

• • • • •

HEARINGS ON JURISDICTIONAL STRIKES

Section 10 (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

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3. PUBLIC LAW 89-456

(80 Stat. 208 amending Section 3 of the Railway Labor Act.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That section 3, Second, of the Railway Labor Act is amended by adding at the end thereof the following:

"If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the

date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the

consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

Sec. 2 (a) The second sentence of section 3, First, (m), of the Railway Labor Act is amended by striking out, "except insofar as they shall contain a money award".

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: "In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination."

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof "shall be conclusive on the parties".

(d) The last sentence of section 3, First, (p), of such Act is amended by inserting before the period

at the end thereof the following: “: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division’s jurisdiction, or for fraud or corruption by a member of the division making the order”.

(e) Section 3, First, of such Act is further amended by redesignating paragraphs (q) through (w) thereof as paragraphs (r) through (x), respectively, and by inserting after paragraph (p) the following new paragraph:

“(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division’s order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division’s jurisdiction, or for fraud or corruption by a member of the division making the

order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

Approved June 20, 1966.

4. RULE 19, FEDERAL RULES OF CIVIL PROCEDURE

(Prior to amendments eff. July 1, 1966)

NECESSARY JOINDER OF PARTIES

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded. In any pleading in which relief is asked, the pleader shall set forth

the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

(As amended Feb. 28, 1966, eff. July 1, 1966)

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a) (1)—(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might

be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)—(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B

Excerpts from Findings of Fact entered by the United States District Court, Northern District of Illinois, Eastern Division in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, Civil Action No. 50 C 684, 128 F. Supp. 331:

"64. ORT regained its place on the Board in 1949, after subscribing to BRC's program for Board procedure and joining BRC and other labor organizations in the following agreement:

'The Chief Executives of the organizations which take cases to the Third Division agreed that any disputes brought to that Division would be supported by the Labor representatives on that Division, provided the provisions of the agreement of the organization submitting the claim did sustain the position taken by the organization. It was further agreed that in the

event the application of a sustaining award would result in a violation of the rules of another agreement, the second organization could also bring a claim to the Third Division to correct such violation and in the event the rules of the agreement involved supported the claim all of the Labor Members of the Board would support that claim. In other words the decisions of the Labor Members on the Board would be based upon the rules in the agreement of the Organization bringing the claim and they would vote to sustain the claim if supported by the rules of the agreement involved or to deny the claim if not supported by the rules of the agreement involved which is the intent and purpose of the Railway Labor Act.'

"This was the same procedural program previously advocated by the BRC and which the labor members of the Board followed from July, 1942 to September, 1949, during which period there was no ORT representative on the Board.

• • • • •
 "156. In disputes such as those involved in Awards 3932, 3933, 3934, 4735, and 5014, it is the settled custom and practice of the Board:

"(a) Not to give notice of the filing of a claim to anyone except the claimant and the railroad named in the claim.

"(b) Not to permit anyone, except the claimant and the railroad named in the claim, to file papers or other documents with the Board.

"(c) Not to give notice of hearing to anyone except the claimant and the railroad named in the claim.

"(d) Not to permit anyone, except those to whom the Board has given notice, to be present at the hearing or to participate in the hearing.

“(e) Not to permit anyone to intervene.

“(f) Not to recognize anyone as a party to a proceeding except the claimant and the railroad named in the claim, and not to make anyone else a party to a proceeding, even when requested to do so.

“157. The settled custom and practice of the Board, described in Finding 156, is caused by the position of the labor members of the Board that only the claimant and the railroad named by the claimant should be given notice and an opportunity to be heard.

“158. The position of the labor members of the Board, described in Finding 157, is the result of a policy fixed by agreement between the chief executives of the railroad labor organizations who comprise the Railway Labor Executives Association and who select, control and discipline the labor members of the Board.

“159. The carrier members of the Board are opposed to its settled custom and practice described in Finding 156. It is their position that the Board should give notice and an opportunity to be heard to all employees and labor organizations involved in disputes submitted to the Board.

“160. The conflicting positions of the labor members and of the carrier members of the Board make it impossible for the Board to decide the issue as to notice and hearing without the aid of referees.

“161. Referees appointed to break deadlocks as to notice and hearing are divided in their opinions. Some agree with the position of the labor members of the Board and render awards on the merits without giving notice and opportunity to be heard; others agree with the position of the carrier members of the Board but render awards dismissing the claims, without prejudice, instead of ordering that notice and hearing be given.

"162. These divergent views and actions of the Board members and the referees, described in Findings 158 to 161, have produced an administrative deadlock, stalemate and frustration on the Board. The carrier members have asked for judicial guidance."

Note: The letters "ORT" in the foregoing referred to The Order of Railroad Telegraphers now changed to Transportation-Communication Employees Union. The letters "BRC" referred to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

APPENDIX C

Policy Declaration of Railway Labor Executives' Association and excerpt from Answer to Interrogatory No. 1, in *The Order of Railroad Telegraphers v. Southern Pacific Company*, No. Civ. 4812-Phx, pending in the U. S. District Court for the District of Arizona.

"Following the decision of the Supreme Court in March 1956, refusing to grant certiorari in the case of *O. R. T. v. N. O. T. & M. Ry. Co.*, 350 U. S. 997, the Organizations whose Chief Executives were affiliated with the Railway Labor Executives' Association decided to review their policy position that neither the Railway Labor Act nor the Constitution of the United States required the divisions of the National Railroad Adjustment Board to serve third party notices.

"In June 1959, the Chief Executives affiliated with the Railway Labor Executives' Association agreed to a Policy Declaration that they would no longer oppose the issuance of third party notices by the divisions of the National Railroad Adjustment Board, and that each Organization receiving a third party notice would reply to such notice in substan-

tially the same manner set forth in a proposed letter attached to the Policy Declaration. A copy of the Policy Declaration with attachment is attached hereto as Exhibit 1."

Policy Declaration Agreed Upon by Chief Executives Affiliated with Railway Labor Executives' Association

The standard Railway Labor Organizations have consistently taken the position that neither the Railway Labor Act nor the Constitution of the United States require the National Railroad Adjustment Board to serve a so-called "third party notice" except in a few isolated instances. The carrier and the carrier members of the Adjustment Board have just as consistently maintained that such notices must be given in all cases where a decision of the Board may conflict with any alleged claim or interest of an employee or labor organization not initially a party to the Board's proceedings.

The lower courts for the most part, have rejected the contention of the labor organizations even in those cases where the alleged third party interest is subject to the jurisdiction of a different division of the Board and the Railway Labor Executives' Association has been unable to obtain a review of these decisions by the United States Supreme Court.

The members of the Railway Labor Executives' Association have agreed that continued opposition to the issuance of the third party notice would be futile and costly whether or not it involves employees whose rights are subject to the same or different divisions of the Board. It has also been agreed that by abandoning our opposition to the granting of a third party notice, the affiliated organizations are not receding from their position that the Board is without authority to adjudicate any rights of any such third party which arises under an agreement different from the one the interpretation or application of which is sought in the initial submission to the Board. In other words, we are maintaining our position that the

Board is not empowered to reconcile conflicting agreements or render any decision which will conflict with the rights of such third parties or their representatives to have the collective bargaining agreements interpreted and applied in proceedings initiated by them.

For the purpose of implementing this policy, all affiliated organizations have agreed as follows:

- (a) That third party notices should be issued by all divisions of the Adjustment Board in each case where the carrier members of the Board requests it and in any other case in which the submissions of the parties disclose the existence of an interest in third parties whether or not the rights of such third parties are subject to the jurisdiction of another division of the Board, and
- (b) That each organization receiving a third party notice shall reply to such notice substantially in the manner set forth in a proposed letter which is attached hereto as Exhibit A and shall not otherwise appear or participate in the proceeding.

The foregoing procedure was adopted to expedite the handling of third party notice cases and to avoid litigation which appears to have little hope of success in view of the precedents already established.

Exhibit A

.....Executive Secretary
National Railroad Adjustment Board

.....Division
220 South State Street
Chicago 4, Illinois

Dear Mr.:

I acknowledge receipt of your letter of _____ giving notice of the pendency of the following dispute before the _____ Division, National Railroad Adjustment Board:

(Quote description of claim as stated in notice)

You advise that said dispute bearing Docket No. _____ will be heard at _____, on _____, at the headquarters of the _____ Division of the National Railroad Adjustment Board, Room _____, Consumers Building, 220 South State Street, Chicago, Illinois.

From the description of the dispute set forth in your letter, it would appear that this is a dispute between the (Carrier) on the one hand and the (petitioning organization) on the other hand involving the interpretation or application of the agreement between them covering the rates of pay, rules and working conditions of employees represented by (petitioning organization). If this understanding is not correct, I would appreciate being further advised.

If my understanding of the nature of the dispute, as set forth in the preceding paragraph, is correct, please be advised that neither the (organization) nor the employees it represents are involved in such a dispute between a carrier and the representative of another craft concerning the interpretation of its agreements between the carrier and the representative of such other craft. The rights of employees represented by the (organization) are predicated upon agreements between the carriers and our organization. If, at any time, and for any reason, a carrier party to an agreement with our organization should undertake to assign work covered by such agreement to employees not covered thereby, we shall, of course, take appropriate steps pursuant to the provisions of the Railway Labor Act to correct any such violation of our agreement and to protect the employees we represent against any loss resulting from any such violation.

Very truly yours,

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FILED
OCT 13 1966

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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October, 1966



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INDEX

	Page
Argument	1
I. The Carrier's reliance on the <i>Pitney</i> and <i>Slocum</i> cases is unwarranted	2
II. The effect of the <i>Whitehouse</i> and <i>Carey</i> decisions on the issue in this case	5
III. TCU's claim did not require the Carrier to take work from employees represented by BRC	7
IV. There is no "national labor policy" expressed in the Railway Labor Act against overlapping contracts	10
V. The Railway Labor Act does not provide the Adjustment Board with jurisdiction to determine jurisdictional disputes between groups of employees	11
VI. BRC was not an indispensable party to TCU's action to enforce Adjustment Board Award No. 9988	13

TABLE OF CITATIONS

CASES:

<i>Carey v. Westinghouse</i> , 375 U.S. 261 (1964)	4, 5
<i>Marbury v. Madison</i> , 1 Cranch 137 (1803)	8
<i>Order of Railway Conductors v. Pitney</i> , 326 U.S. 561 (1946)	2, 3
<i>Shields v. Barrow</i> , 21 U.S. 409 (1854)	13
<i>Slocum v. Delaware, L. & W. R.R.</i> , 339 U.S. 239 (1950)	2, 3
<i>Washington Terminal Co. v. Boswell</i> , 124 F. 2d 235 (D.C. Cir. 1941)	7
<i>Whitehouse v. Illinois Central R.R.</i> , 349 U.S. 366 (1955)	2, 5, 7

STATUTES:	Page
National Labor Relations Act, 29 U.S.C. 151-168, 61 Stat. 136:	
Section 10(k)	10
Railway Labor Act, 45 U.S.C. 151-164, 48 Stat. 1185:	
Section 3, First, (i)	12
Section 3, First, (p)	8

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The 76 page brief of the Carrier contains so many inaccurate statements and irrelevant arguments that a reply brief of at least like size would be necessary to demonstrate all the distortions drawn by it. We believe, however, that most of the errors in the Carrier's brief

are apparent and need no further comment by TCU. This reply brief, therefore, will be devoted only to a discussion of the more salient points of the Carrier's brief.

I. The Carrier's reliance on the Pitney¹ and Slocum² cases is unwarranted.

In TCU's petition to this Court for certiorari to review the determination of the Court of Appeals, we showed that neither the *Pitney* nor *Slocum* cases determined the issue in this case, to-wit, whether the Adjustment Board had jurisdiction to determine and was required to determine the rights of employees represented by BRC when the claim before the Adjustment Board merely concerned a dispute between the Carrier and TCU as to whether the Carrier violated its agreement with TCU when it did not assign the performance of certain work to employees represented by TCU.

Our reliance for such assertion was a statement to that effect by this Court in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955). Thus, in *Whitehouse*, this Court stated (at 371-372):

"Assuming the Act permits the Board to consider the claim of one union in light of competing agreements between Railroad and other unions, see *Order of Railway Conductors v. Pitney*, 326 U.S. 561, does it permit 'final and binding' awards to be rendered interpreting both contracts and resolving the independent claims of both unions in a single proceeding?"

¹ *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

² *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950).

We further pointed out that the Court did not answer the question in *Whitehouse*, but that it must be answered here since the Court below held that not only does the Railway Labor Act "permit" the Adjustment Board to make final and binding interpretations of both contracts, but that the Act *requires* the Adjustment Board to do so.

We made this same point in our initial brief in this case (Brief, at 29). Notwithstanding such statement by this Court, the Carrier in its reply to TCU's petition for certiorari (pp. 14-16) and in its brief to this Court (pp. 25-32) continues to argue that the issue herein already has been determined in the *Pitney* and *Slocum* cases without the slightest attempt to explain its assertion in light of this Court's statement to the contrary in *Whitehouse*.

Instead, the Carrier engages in an exhausting analysis of the *Pitney* and *Slocum* cases dredging up such matters as the union's statements in its petition for rehearing in the *Pitney* case, and the union's brief in the *Slocum* case, which, in light of this Court's statement in *Whitehouse*, become entirely irrelevant. We submit that this Court in *Pitney* and *Slocum* was concerned with entirely different issues which do not bear on the issue presented herein. Our contentions on this point are set forth fully in our initial brief, at pages 27-29.

In its discussion of the *Pitney* and *Slocum* cases, the Carrier raises an additional contention which it likewise sets forth at various other places in its brief. The Carrier states (p. 31):

"The theory now advanced by TCU here would reduce Adjustment Board handling of interunion

work-assignment disputes to an exercise of futility. Nothing would be resolved-indeed, every time the Adjustment Board decided a work assignment dispute in favor of the claiming union another dispute would be created."

Even assuming that the dispute before the Adjustment Board in this case could be considered an "inter-union" dispute, which it was not (see our initial brief, pp. 11-16), and even assuming that the Adjustment Board has jurisdiction to determine "interunion" disputes, which it does not (see our initial brief, pp. 16-26), the Adjustment Board nevertheless would have jurisdiction to proceed in the absence of BRC. This Court held that to be so in *Carey v. Westinghouse*, 375 U.S. 261 (1964) wherein the Court stated (at 265):

"Grievance arbitration is one method of settling disputes over work assignments; and it is commonly used, we are told. To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it. The case in its present posture is analogous to *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, where a railroad and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the Railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it.' *Id.*, at 373."

We thus see that this Court does not agree with the Carrier's position that the absence of a potentially rival union "would reduce the Adjustment Board[']s handling of . . . disputes to an exercise of futility." It should be noted that the Carrier's position (Brief, p. 31) relies upon the dissent in the *Carey* case and conveniently ignores that the majority did not accept the dissenting opinion's arguments.

II. The effect of the *Whitehouse*³ and *Carey*⁴ decisions on the issue in this case.

The TCU's contentions with respect to this point are set forth in our initial brief, at pages 27-35.

The Carrier's contention (Brief, p. 33), that this Court's statement in *Whitehouse* that even if notice were given to the Clerks they could be "indifferent to it" and could "refuse to participate", meant only that the Clerks could not be *forced* to participate but did not mean that by refusing to participate they would not forfeit their rights, defies comprehension, and defies any attempt to deal with it.

The Carrier's discussion of the *Carey* case, however, contains a serious misstatement with which we must deal. On page 35 of the Carrier's brief, it states that this Court in *Carey* stated that "if the employer's assignment of work were in accordance with the NLRB decision, 'it would not be liable for damages under § 301 [Id. at 272].'" The Carrier's statement of this Court's holding in *Carey* simply does not accord with the Court's decision.

In *Carey*, the Court recognized that the dispute involved could come within one of two areas. First,

³ *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955).

⁴ *Carey v. Westinghouse*, 375 U.S. 261 (1964).

it could involve a jurisdictional dispute as to which group of competing employees is entitled to the assignment of particular work; second, the dispute could involve a question as to which labor organization represents a particular group of employees. The Court held that in either event arbitration of the dispute should proceed.

The Court divided its discussion of the two possible areas of dispute and discussed the jurisdictional dispute aspect at pages 263-266 of its opinion and discussed the representational dispute aspect at pages 266-272. It is in the course of the Court's discussion of the *representational* aspect of the dispute that the partial quotation appearing in the Carrier's brief appears. The entire sentence reads (375 U.S. 261, at 272):

"Should the Board [NLRB] disagree with the arbiter, by ruling, for example, *that the employees involved in the controversy are members of one bargaining unit or another*, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301."

The Court did not say, contrary to the Carrier's brief, that if the employer's *assignment of work* were in accordance with the determination of the NLRB under Section 10(k) that the employer would have no liability in a suit for damages brought under Section 301 of the National Labor Relations Act (NLRA) by a union which had a contractual right to perform such work but to whom such work was not awarded by the NLRB. We have found no cases in which this Court, or any court, has held that such is the law. On the other hand, as we pointed out in our initial brief (at 36-37), this Court

in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, 372, and the Court of Appeals for the District of Columbia Circuit in *Washington Terminal Company v. Boswell*, 124 F. 2d 235, 249 (1942), found no inhibition against the possibility of dual liability.⁵

III. TCU's claim did not require the Carrier to take work from employees represented by BRC.

The TCU's contentions on this point are set forth in its initial brief, pages 11-16. The Carrier's position is set forth in its brief at pages 44-49. We will comment only on two of the points raised therein.

First, the Carrier contends (Brief, at 47) that since TCU's complaint to enforce the Award and Order of the Adjustment Board requested the Court to enforce the Award and Order "by writ of mandamus or otherwise" TCU cannot deny that it was seeking the actual

⁵ The Carrier (Brief, at 34) seeks to overcome the effect of this Court's statement in *Whitehouse* that there was no "legal right of the complaining party to be free from such injuries" by stating that the Court was not referring to the possibility of liability to both unions but only to the possibility of "double vexation" because it might be required to devote time and money to what it deemed to be an invalid proceeding. This assertion, however, is not supported by the Court's opinion in the *Whitehouse* case. The Court clearly was referring to the Carrier's contention that it might incur dual liability. Thus, in the paragraph immediately preceding the Court's statement that the carrier would have no legal right to be free of "such" injuries we find (349 U.S. at 371):

"Again, we have been asked to judge Railroad's present claim to relief on the basis of irreparable injuries which are alleged to flow from the dilemma in which Railroad will find itself confronted either by an invalid award or a situation in which no valid award may be obtained. Railroad asserts that this dilemma is inevitable and *will entail* continuing industrial friction, *the possibility of conflicting awards to both unions*, and accumulating claims to back pay or damages which might have been avoided had notice been given and a valid award been rendered." (Emphasis added.)

assignment of work and not merely money damages, since a writ of mandamus is an inappropriate remedy to enforce a claim for money damages. Such contention is unsound. The only reason for TCU's use of the language "by writ of mandamus or otherwise" is that Section 3, First, (p) of the Act (45 U.S.C. § 153, First, (p)) uses such phraseology. The last sentence of that Section provides:

"The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

In *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803), the Court referred to Blackstone for the definition of a writ of mandamus. The Court stated (2 L. Ed. at 64):

"Blackstone, vol. 3, p. 110, says that a writ of mandamus is 'a command issuing in the king's name from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. *It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have anything done, and has no other specific means of compelling its performance.*'" (Emphasis added.)

All that Section 3, First, (p) did was to make statutory the common law remedy of mandamus, and all that the Congress intended is that a district court, in the enforcement of an award and order of the Adjust-

ment Board, shall have the power to direct a carrier to carry out the decision of that administrative tribunal. Such mandate may be applied with equal facility to a determination by the Adjustment Board requiring the payment of money as to a determination requiring the performance of some other task.

The Carrier next argues (Brief, p. 48) that there is no distinction between the dispute in this case and a jurisdictional dispute because if the District Court had enforced the Adjustment Board's Award and Order for the payment of money damages, the Carrier would have replaced its clerks with telegraphers to avoid paying two salaries, and thus employees represented by BRC are involved in the dispute. Such argument is fallacious.

The fact that the Carrier may pursue a particular course of action as a result of an adverse judgment, in attempting to mitigate the impact of the judgment, does not ipso facto determine that employees who might be affected by such course of action are parties to the dispute. The critical question is whether the Carrier's action in taking the work from the clerks would be required by the judgment. If the question is answered in the negative, as it must be in the present case, any action taken by the Carrier will be subject to relief if unlawful. Thus, if the Carrier should discharge clerks, and if such action would be violative of the BRC agreement, it would be subject to corrective action in a claim brought by BRC in a proceeding before the Adjustment Board. Such possibility obviously does not make BRC a party to the claim by TCU.

IV. There is no "national labor policy" expressed in the Railway Labor Act against overlapping contracts.

The Carrier argues (Brief, pp. 49-54) that there is a "national labor policy" against a carrier entering into overlapping contracts assigning the work to groups of employees in different crafts or classes and that when such agreements have been made the "national labor policy" requires the Adjustment Board to extricate the Carrier from its predicament by ascertaining which group of employees is entitled to perform the work with no liability to accrue to the Carrier in having entered into separate agreements assigning the same work to different groups of employees.

The so-called "national labor policy" referred to by the Carrier is that found in Section 10(k) of the National Labor Relations Act (29 U.S.C. § 160) (NLRA) which provides that when two groups of competing employees claim the same work, and one of the competing groups strike to obtain the work, the NLRB shall hear the dispute and determine which group of competing employees should perform the work. There is no similar provision under the Railway Labor Act, however. Furthermore, even under Section 10(k), we know of no case in which a court has held that if the employer had *contracted* to assign the work to two different unions, that the union, to which the work was not assigned pursuant to a determination by the NLRB under Section 10(k), would not have a cause of action for breach of such agreement. Certainly such suit would not in any way interfere with the "national labor policy" as expressed in Section 10(k) of the NLRA against strikes over work assignments. The public policy has been completely satisfied by the Section 10(k) proceeding which ended

the strike and permitted the disputed work to be continued. We can imagine no public policy which would be served by allowing an employer to violate contractual obligations with impunity.

There is no counterpart of Section 10(k) of NLRA in the Railway Labor Act. And even if there were, it would not come into operation in the situation we have here, for it comes into operation only when there is a strike over a work assignment. Such situation does not arise under the Railway Labor Act. That Act provides for arbitration of "minor disputes", for the arbitration of disputes over the interpretation or application of agreements, and provides for no other resolution of disputes over work assignments.

V. The Railway Labor Act does not provide the Adjustment Board with jurisdiction to determine jurisdictional disputes between groups of employees.

The contentions of TCU on this point are set forth in its initial brief, at pages 16-26.

In our initial brief (pp. 19-20) we showed that the composition of the Adjustment Board into four independent divisions, each with plenary power over disputes involving employees within its respective division is additional indication that Congress did not intend the Adjustment Board to have jurisdiction to determine inter-union disputes, referring to situations which arise when employees in one division claim that their agreement covers work which the Carrier assigned to employees in another division. We concluded that in such situations, there is nothing in the Railway Labor Act to prevent each of the groups of employees from filing claims before their respective divisions of the Adjustment Board and from receiving sustaining

awards. The Carrier (Brief, at 55) refers to our argument as a "hypothetical situation" notwithstanding the fact that our brief (p. 20, footnote 1) cites five cases in which precisely such a situation has occurred. Many more examples could have been provided.

Significantly, the Carrier concedes (Brief, pp. 61-62) that the Adjustment Board does *not* "in the first instance have jurisdiction to consider a work assignment dispute which was framed as being entirely between two unions." Of course, it can not do otherwise in face of the precise language of Section 3, First, (i) of the Railway Labor Act (45 U.S.C. § 153, First, (i)) which limits the jurisdiction of the Adjustment Board to disputes "between an employee or group of employees and a carrier or carriers."

The Carrier argues (Brief, at 62), however, that since TCU framed the claim before the Adjustment Board as a dispute between itself and the Carrier, the Adjustment Board thereby acquired jurisdiction to determine "the basic reality" of the claim which was "that it actually involved an attempt by TCU to exert jurisdiction over work assigned to employees represented by BRC."

We thus would have the unique situation in which, according to the Carrier, an administrative agency must assert jurisdiction over a dispute, which it does not have jurisdiction to determine, simply because of an erroneous submission of the dispute to the tribunal as a dispute over which it does have jurisdiction. Once the Adjustment Board asserts jurisdiction to determine what it mistakenly believed to be a dispute between a union and an employer, it somehow, through some mystery, would have its jurisdiction enlarged to

encompass whatever the dispute actually involves. The Carrier cites no authority for this novel theory, nor can it claim logic for its forbear.

VI. BRC was not an indispensable party to TCU's action to enforce Adjustment Board Award No. 9988.

The issue of whether the BRC was an indispensable party to the TCU's enforcement action is viewed by the Carrier (Brief, pp. 65-76) as an issue separate and apart from the issue of whether the Adjustment Board had jurisdiction to determine *and was required to determine* the right of employees represented by BRC in the proceeding initiated by TCU.

It is apparent that whether BRC was an indispensable party to the enforcement action, of necessity, will depend upon the resolution of the primary issue of whether BRC was an indispensable party to the proceedings before the Adjustment Board. TCU contends that BRC was not an indispensable party before the Adjustment Board since TCU's claim merely concerned the rights of employees represented by TCU under its agreement with the Carrier. The Adjustment Board's determination that the Carrier violated its agreement with TCU in no way did, or could, affect the rights of employees represented by BRC which rights, if any, stem from another collective bargaining agreement which was not a subject of a dispute before the Adjustment Board or anywhere else.

If TCU's position is sound, it follows that TCU's action to enforce the Award and Order of the Adjustment Board likewise could have no affect on the rights of employees represented by BRC. The portion of this Court's decision in *Shields v. Barrow*, 21 U.S. 409, 411

(1854), cited by the Carrier, to-wit, that a person is indispensable only, if he has

“an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience,”

clearly is inapplicable to BRC since BRC has no interest in the final decree that determines merely the rights of other employees, not represented by BRC, under a collective bargaining agreement to which BRC was not a party, and concerning which it has stated that it has no interest. (R. 76-77)

The Carrier further asserts (Brief, at 73) that one of the issues upon which BRC might wish to comment in the enforcement action is that purportedly raised by TCU, namely:

“TCU has intimated that BRC, by failing to participate in the Adjustment Board proceedings, in effect waived any interest it may have had to the work involved.”

The Carrier fails, as it fails so often to do in its brief, to cite any reference for its assertion and in fact such assertion is not founded on fact.

Finally, the Carrier contends (Brief, at 74-76) that BRC was an indispensable party to TCU's action to enforce the Award and Order of the Adjustment Board “to protect Union Pacific in its compliance with any decree or judgment.”

Underlying this argument of the Carrier is its apparent belief that it has what is tantamount to an inherent right to be relieved from any possibility of dual

liability to different groups of employees in situations in which it may have contracted to provide each group of employees with the right to perform the same work. We know of no basis for such right. The Adjustment Board was created for the primary purpose of adjudicating claims between employees and carriers arising from their collective bargaining agreements. It is entirely consistent with such purpose that a carrier may find itself in a position in which it has made itself contractually bound under two separate agreements to assign the same work to different groups of employees and liable for damages for breach of the agreement to the group to whom the work is not assigned.

Respectfully submitted,

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October, 1966

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INDEX

	Page
Reasons for Granting the Writ	1
I. The jurisdiction of the National Railroad Adjustment Board with respect to work assignment disputes is left uncertain by the Court ..	1
II. We respectfully submit that the Court erred in directing the District Court to remand the National Railroad Adjustment Board	4
III. The Court should reconsider the issue of whether the National Railroad Adjustment Board is an appropriate tribunal to exercise the jurisdiction the Court has conferred upon it in light of the due process of law requirements of the Constitution	6
Conclusion	8
Certificate	8

TABLE OF CITATIONS

CASES:

Brady v. Trans World Airlines, 167 F. Supp. 469 (D. Del., 1958)	8
Brotherhood of Railroad Trainmen v. Swan, 214 F. 2d 56 (7th Cir. 1954)	6
Edwards v. Capital Airlines, 176 F. 2d 755 (D.C. Cir. 1949)	8
Hornsby v. Dobard, 291 F. 2d 483 (5th Cir. 1961)	8
In Re Murchison, 349 U.S. 133 (1955)	8
Tumey v. Ohio, 273 U.S. 510 (1927)	8

STATUTES:

Railway Labor Act, 45 U.S.C. 151-164, 48 Stat. 1185	
Section 3, First (a)	6
Section 3, First (l)	7
Section 3, First (n)	7
Section 3, First (p)	5
Public Law 89-456, 80 Stat. 208	
Section 2 (e)	5

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PAGE

IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY.

PETITION FOR REHEARING

The petitioner, Transportation-Communication Employees Union ("TCU"), prays that this Court grant rehearing of its order of December 5, 1966, remanding the case to the District Court with directions to that court to remand the dispute to the National Railroad Adjustment Board for further proceedings.

REASONS FOR GRANTING REHEARING

- I. The Jurisdiction of the National Railroad Adjustment Board With Respect To Work Assignment Disputes Is Left Uncertain By the Court**

In presenting their arguments before this Court, with respect to the jurisdiction of the Adjustment Board in the area of work assignment disputes, the positions taken by TCU and by the respondent Carrier

were diametrically opposite. TCU contended that the jurisdiction of the Adjustment Board is limited to determining claims between carriers and employees whether one of the parties to a collective bargaining agreement has violated that agreement and that the Adjustment Board does not have jurisdiction to determine disputes as to which of two groups of employees is entitled to the assignment of performing particular work.

The Carrier on the other hand, took the position that the Adjustment Board does have jurisdiction to determine which group of employees is entitled to perform disputed work, and that the Adjustment Board does not have jurisdiction to determine that the Carrier had entered into separate lawful agreements with two labor organizations assigning the same work to two groups of employees and to provide a remedy for both groups.

There is, however, a third possibility with respect to the jurisdiction of the Adjustment Board in this area which, although not urged by either of the parties, appears to be the view of the Court. This possibility is that the Adjustment Board has jurisdiction to determine, and must determine, two issues in claims involving such disputes. First, the Adjustment Board must determine which group of employees is entitled to the assignment of the work in dispute. Second, having determined which group of employees is entitled to perform the disputed work, the Adjustment Board then must determine whether the agreement between the carrier and the labor organization representing employees to whom the work is not assigned, obligates the carrier to pay such other employees.

The majority of the Court appears to adopt this third possibility. Thus, the Court states (Opinion of the Court, p. 5):

“Here, though two jobs existed when the collective bargaining agreements were made and though the railroad properly could contract with one union to perform one job and the other union to perform the other, automation has now resulted in there being only one job, a job which is different from either of the former two jobs and which was not expressly contracted to either of the unions. *Although only one union can be assigned this new job, it may be that the railroad's agreement with the nonassigned union obligates the railroad to pay it for idleness attributable to such automation job-elimination. But this does not mean that both unions can, under their separate agreements, have the right to perform the new job or that the Board, once the dispute has been submitted to it, can postpone determining which union has the right to the job in the future.*” (Emphasis added.)

The Court's statement appears to fault the Adjustment Board's determination of TCU's claim, not because the Adjustment Board did not have jurisdiction to determine whether the agreement between the Carrier and TCU obligated the Carrier *to pay* employees represented by TCU whether or not they performed the disputed work, but only because the Adjustment Board failed *also* to determine, in the same proceeding, which group of employees was entitled *to perform* the work in dispute, thus “postpon[ing] determining which union has the right to the job in the future.”

The dissenting opinion, however, beclouds the matter. Thus, the dissenting opinion states (Dissenting Opinion, pp. 12-13):

"The Court today rules that whatever the collective bargaining agreements provide—regardless of their provisions, and of the understanding of the parties—the Board must award the disputed work to one union or the other, and that it cannot provide a remedy to members of both, even if their contracts should so demand." (Emphasis added.)

A clarification of the Court's opinion with respect to the jurisdiction of the Adjustment Board in the area of this kind of disputes, an area in which the Adjustment Board has not heretofore trod, is necessary to enable the parties subject to the Railway Labor Act to be aware of their rights under the Act, and to enable the Adjustment Board to perform correctly its statutory duties.

II. We Respectfully Submit That the Court Erred in Directing the District Court To Remand the Dispute To the National Railroad Adjustment Board.

This Court affirmed the decision of the Court of Appeals that the Clerks' union should be a party before the Adjustment Board, but, instead of setting aside the order of the Adjustment Board as did the Court of Appeals, it remanded the cause to the District Court with directions to remand the case to the Adjustment Board for further proceedings. Such remand, however, is contrary to the express terms of the Railway Labor Act.

Footnote 4 of the Court's opinion (Opinion of the Court, p. 9) sets forth the basis of the Court's decision to remand the case. The Court notes that at the time the case was pending before the Court below,

"the Court of Appeals had no alternative but to affirm the dismissal by the District Court, for district courts could only 'enforce or set aside' the

Board's orders under § 3 First (p). They could not remand cases to the Board. This was changed on June 20, 1966, by Pub. L. No. 89-456, § 2(e), 80 Stat. 208, which inserted a new provision, § 3 First (q), empowering district courts to remand proceedings to the Board."

The Court's reliance upon the 1966 amendments to the Railway Labor Act in remanding the case to the Adjustment Board, however, is misplaced. Section 3, First (q), as amended on June 20, 1966, is a new provision of the Act pursuant to which a party aggrieved by the failure of the Adjustment Board to make an award, or aggrieved by any of the terms of the award or by the failure of the division to include certain terms in such award is permitted to petition the District Court for review of the Adjustment Board's order. In considering such petition for review, the District Court is given jurisdiction,

"to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct." (Emphasis added.)

The suit in the present case, however, was not instituted to *review* an order of the Adjustment Board, but rather, to *enforce* an order of the Adjustment Board. The exclusive provision of the Act dealing with enforcement suits (except for time limits) is still Section 3, First (p). The jurisdiction of the District Court in enforcement suits, with respect to the disposition it can make of such suits, was not affected by the 1966 amendments to the Railway Labor Act except that the grounds upon which an award may be set aside were restricted. Section 3, First (p) provides:

"The district courts are empowered, under the rules of the court governing actions at law, to

make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (Emphasis added.)

Accordingly, the courts are not empowered to remand a case in a suit to enforce an order of the Adjustment Board. In the present case, therefore, the Court had power only to set aside the award and order and could not remand the case to the Adjustment Board.

The District Court dismissed the complaint for lack of an indispensable party in the court proceedings. The Court of Appeals affirmed. The correct disposition now, if the Court adheres to its decision notwithstanding Point III of this Petition, is a remand to the District Court with directions to set aside the award and order of the Adjustment Board in conformity with Section 3, First (p) of the Railway Labor Act.

The posture of the dispute upon the setting aside of the award and order, is that the dispute would remain open and pending before the Adjustment Board awaiting performance by the Board of its statutory duty to make a valid award and order disposing of it. *Brotherhood of Railroad Trainmen v. Swan*, 214 F. 2d 56 (7th Cir. 1954.)

III. The Court Should Reconsider the Issue of Whether the National Railroad Adjustment Board Is An Appropriate Tribunal To Exercise the Jurisdiction the Court Has Conferred Upon It In Light of the Due Process of Law Requirements of the Constitution

The Adjustment Board is a bipartisan organization composed of an equal number of labor organizations' representatives and carriers' representatives. (Section 3, First (a), 45 U.S.C. § 153, First (a).) An

additional and neutral member of the Adjustment Board is appointed only when there is a deadlock among the partisan members and hence inability to reach a majority decision of a dispute before it. (Section 3, First (l) and (n), 45 U.S.C. § 153, First (l) and (n).)

The composition of the Adjustment Board is such that it cannot afford a group of employees, claiming that a carrier should have assigned certain work to them, with the requisite fair hearing. Neither the majority nor concurring opinions of the Court discuss this issue. Although the dissenting opinion does note the inequitable result that could emerge because of the "peculiar" composition of the Adjustment Board (Dissenting Opinion, page 11, footnote 8), it too fails to recognize the due process issue involved.

The denial of due process which will result if the Adjustment Board has the jurisdiction conferred upon it by the Court, is patent in this case. Thus, in the present case, TCU would be required to bring its claim before the Adjustment Board, Third Division. This division consists of ten members, five of whom represent the interests of the Carrier who already has determined the work assignment dispute in favor of another group of employees not represented by TCU, and a sixth member, who was chosen to serve as a representative on the Adjustment Board by a labor organization representing the group of employees to whom the work was assigned. TCU would, accordingly, be compelled to progress its claim before a tribunal of ten members, six of whom have an interest in the controversy adverse to the claimant. Almost certainly those six members would make the decision and a referee would never participate, as the Court appar-

ently assumed he would. Such a proceeding could not possibly meet the due process requirements of the Constitution. Cf. *Tumey v. Ohio*, 273 U.S. 510 (1927); *In Re Murchison*, 349 U.S. 133 (1955); *Hornsby v. Dobard*, 291 F. 2d 483, 487 (5th Cir. 1961); *Edwards v. Capital Airlines*, 176 F. 2d 755, 760-761 (D.C. Cir. 1949); *Brady v. Trans World Airlines*, 167 F. Supp. 469, 472 (D. Del., 1958).

CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted.

Respectfully submitted,

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Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel for Petitioner

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 28

TRANSPORTATION-COMMUNICATION
EMPLOYEES UNION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

**On Writ of Certiorari to the United States Court
of Appeals for the Tenth Circuit**

**BRIEF OF RAILWAY LABOR EXECUTIVES'
ASSOCIATION, AS AMICUS CURIAE, IN
SUPPORT OF PETITION FOR REHEARING.**

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*Attorneys for Railway Labor
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As Amicus Curiae*

Dated at Toledo, Ohio, this
29th day of December, 1966.

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In The

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October Term, 1966

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of Appeals for the Tenth Circuit**

**BRIEF OF RAILWAY LABOR EXECUTIVES'
ASSOCIATION, AS AMICUS CURIAE, IN
SUPPORT OF PETITION FOR REHEARING.**

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition filed herein by Transportation-Communication Employees Union seeking a rehearing of the Court's order of December 5, 1966, remanding the case to the District Court with directions to that court to remand the dispute to the National Railroad Adjustment Board for further proceedings. The consent of all parties to the case has been obtained and such consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The interest of the Railway Labor Executives' Association is as set forth in its brief as *amicus curiae* heretofore filed on the merits of the case.

REASONS FOR GRANTING REHEARING

In addition to questions as to the procedure to be followed by the National Railroad Adjustment Board in disposing of work jurisdiction claims of competing crafts of employees, the present case necessarily involves other issues of vital importance to the conduct of collective bargaining in the railroad industry. These issues were discussed in the brief previously filed herein by the *amicus curiae* Railway Labor Executives' Association, and we shall not burden the Court with any elaboration of that discussion. We respectfully suggest, however, that the holding of the Court should be reconsidered in the light of those issues, and either changed or clarified in a further opinion, if uncertainty verging on chaos is to be avoided in important segments of labor-management relations under the Railway Labor Act.

I. THE COURT'S OPINION FAILS TO SPECIFY CLEARLY THE DISPOSITION OF THE DIS- PUTE TO BE MADE BY THE ADJUSTMENT BOARD ON REMAND.

The holding by the majority of the Court is described in its opinion (p. 3) as follows:

"We granted certiorari in order to settle doubts about whether the Adjustment Board must exercise its exclusive, jurisdiction to settle disputes like this in a single proceeding with all disputant unions present. . . . We hold that it must."

The opinion does not, however, state whether, having thus considered the entire dispute with all parties before it, the Board must then sustain the claim of one union, and only one, under its agreement, or whether, in the event of overlapping contracts, it might sustain both claims even though actual performance of the work could only be allocated to one craft.

The latter interpretation would seem to be supported by language in the Court's opinion indicating that a carrier might have to assign the work to one craft while paying members of the competing craft for breach of their agreement. Other language supports the conclusion of the dissenting Justices that:

"The Court today rules that whatever the collective bargaining agreements provide — regardless of their provisions, and of the understanding of the parties — the Board must award the disputed work to one union or the other, and that it cannot provide a remedy to members of both, even if their contracts should so demand." (Dissenting opinion, pp. 12-13.)

If the dissenting opinion is correct in its appraisal of the holding of the majority of the Court, serious questions arise as to the source of the Adjustment Board's authority to make such an award, the criteria to be used by it, and the effect of the award on other procedures under the Railway Labor Act. These questions relate directly to the soundness of the Court's decision in this case, and need to be considered and answered at this time, not only by way of justifying the conclusion reached, but also for purposes of effective functioning of the disputes handling procedures of the Railway Labor Act.

**II. THE COURT SHOULD RECONSIDER ITS
DECISION IN THE LIGHT OF ITS EFFECT
ON THE JURISDICTION OF THE NATION-
AL MEDIATION BOARD.**

The National Mediation Board, in the exercise of its function, under Section 2, Ninth of the Railway Labor Act, of settling representation disputes and certifying bargaining representatives for the various crafts and classes of employees, regularly makes so-called "Determinations of Craft or Class," wherein it specifically decides, by job classification, the consist of employee bargaining units. If, as indicated in the dissenting opinion herein, the Court's decision means that the National Railroad Adjustment Board is to make final and binding decisions as to the *right* of a craft to include a particular job within the scope of its collective bargaining agreement, the potential conflict in the jurisdiction of the two Boards is immediately apparent.

This issue is not dealt with in the Court's opinion, and it leaves unanswered questions as to the binding effect of an award of work by the Adjustment Board, on past or future craft or class determinations of the Mediation Board, or the weight to be given a Mediation Board determination in the deliberations of the Adjustment Board. Numerous previous decisions of this Court have described the jurisdiction of each of these Boards as "exclusive"; and we submit that the Court's decision herein should be reconsidered in the light of its apparent abandonment of this concept in favor of a theory of concurrent subject matter jurisdiction of the two administrative tribunals.

III. THE COURT SHOULD RECONSIDER ITS DECISION WITH RESPECT TO ITS EFFECT ON THE MAJOR DISPUTES HANDLING PROCEDURES OF SECTION 6 OF THE RAILWAY LABOR ACT.

The opinion of the Court, while indicating that the Adjustment Board must resolve work jurisdictional disputes in a single proceeding with all competing crafts being brought in as parties and bound by the award, fails to indicate what the legal nature, force and effect of such an award would be. Does it stand simply as an interpretation of the existing agreements of the competing crafts, subject to change pursuant to the procedures of Section 6 of the Act for changing or terminating agreements? Or does it, as the dissenting opinion indicates, constitute a final and binding adjudication that only the prevailing union, and no other, has the right to negotiate an agreement covering the disputed work? If the latter view is correct, the decision here represents a clear reversal of the long established doctrine of *General Committee, B.L.E. v. Missouri-K.-T. R. Co.*, 320 U.S. 323, 336-337.

The Court's opinion fails to discuss the issues in the light of the major disputes handling procedures of the statute, but they are clearly relevant to the concern expressed by the Court for the plight of a carrier caught in a "merry-go-round situation".

Such a situation, and the prospect of continuing dual liability under overlapping contracts, can be avoided or quickly terminated by a carrier through resort to the contract changing provisions of the Act. If questions of craft work jurisdiction are now to be withdrawn from the area of contract negotiation, and frozen by awards of the Adjustment Board, carriers as well as unions will be denied this flexibility previously available under Section 6 of the Act.

CONCLUSION

The opinion of the Court should be clarified, and the questions discussed above should be answered at this time, to avoid an unpredictable period of disruption of collective bargaining under the Railway Labor Act. And we submit that serious consideration should be given to the soundness of the decision previously announced, in the light of these issues. We have not discussed, but concur with, the additional compelling reasons for rehearing set forth in the petition of the Transportation-Communication Employees Union.

For the foregoing reasons, we respectfully urge that the petition for rehearing be granted.

Respectfully submitted,

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Dated at Toledo, Ohio, this
29th day of December, 1966.

*Attorneys for Railway Labor
Executives' Association
As Amicus Curiae*

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Labor Executives' Association, as *amicus curiae*, do hereby certify that on the 29th day of December, 1966, I served a copy of the foregoing brief of Railway Labor Executives' Association as *amicus curiae* upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Milton P. Kramer, Lester P. Schoene and Martin W. Fingerhut, 1625 K Street, N.W., Washington, D.C. 20006, Attorneys for petitioner, Transportation-Communication Employees Union; F. J. Melia, Harry Lustgarten, Jr. and James A. Wilcox, 1416 Dodge Street, Omaha, Nebraska 68102, Attorneys for respondent, Union Pacific Railroad Company.

Richard R. Lyman

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SUPREME COURT OF THE UNITED STATES

No. 28.—OCTOBER TERM, 1966.

Transportation-Communication Employees Union, Petitioner, v. Union Pacific Railroad Co.	}	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
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[December 5, 1966.]

MR. JUSTICE BLACK delivered the opinion of the Court.

Transportation-Communication Employees Union, the petitioner, is the bargaining representative of a group of railroad employees commonly known as "Telegraphers." Prior to 1952 these telegraphers were commonly assigned the duty of sending, by telegraph, railroad way bills, manifests and orders prepared by clerks, members of the Brotherhood of Railway Clerks. In 1952, however, the respondent here, Union Pacific Railroad Company, bought and began using IBM machines which resulted in a radical change in the workload of the telegraphers and clerks. In operating the machines the communication functions previously performed by the telegraphers are automatically performed when the machines do the clerical work previously done by the clerks. As a result, the railroad's need for telegraphers was practically eliminated and operation of the IBM machines was assigned to members of the clerks' union. This case arises out of the dispute over the railroad's assignment of these jobs to the clerks. The telegraphers' union, claiming the jobs for its members under its collective bargaining agreement, protested the railroad's assignment and, in due course, referred its claim to the Railroad Adjustment Board as authorized by § 3 First (i)

2 T. C. E. U. v. UNION PACIFIC R. CO.

of the Railway Labor Act.¹ Notice of the referral was given to the clerks' union, which, pursuant to an understanding with the other labor unions, declined to participate in this proceeding on the ground that it had no interest in the matter but stated its readiness to file a like proceeding before the Board to protect its members should any of their jobs be threatened.² The Board

¹ This section provides:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner . . . but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 44 Stat. 578, as amended, 48 Stat. 1191, 45 U. S. C. § 153 First (i).

² Section 3 First (j) of the Act, 45 U. S. C. § 153 First (j), requires the Adjustment Board to "give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." Prior to this case it was the policy of the various railroad unions, including the clerks' and telegraphers', in work-assignment disputes submitted to the Board, to refuse to give notice under this provision and to prohibit participation in Board proceedings by anyone but the involved railroad and the petitioning union. This policy, followed by the labor members of the Board, resulted in no notice being given to the nonpetitioning union. See *Whitehouse v. Illinois Cent. R. Co.*, 349 U. S. 366, 372. In 1959, after some courts had refused to enforce the Board's awards where it had failed to notify the nonpetitioning union, see, e. g., *Order of R. R. Telegraphers v. New Orleans T. & M. R. Co.*, 229 F. 2d 59, cert. denied, 350 U. S. 997, the Railway Labor Executives' Association, comprised of the various railroad unions, changed this policy to the extent that notice would henceforth be given to nonpetitioning unions. Yet the Railway Labor Executives' Association prescribed a form-letter response—to be sent by the notified nonpetitioning union to the Board—which disavowed any interest in the dispute and declined the opportunity to participate before the Board except in a subsequent and separate proceeding initiated by

then heard and decided the case without considering the railroad's liability to the clerks under its contract with them, concluded that the telegraphers were entitled to the jobs under their contract, and ordered that the railroad pay the telegraphers who had been idle because of the assignment of the jobs to the clerks. The telegraphers' union then brought this action in a United States District Court to enforce the Board's award as authorized by § 3 First (p) of the Act. That court dismissed the case on the ground that the clerks' union was an indispensable party, and that the telegraphers, though given the opportunity, refused to make it a party. 231 F. Supp. 33. Affirming the dismissal, the Court of Appeals pointed out that the Board had failed to carry out its exclusive jurisdictional responsibility to decide the entire dispute with relation to the conflicting claims of the two unions under their respective contracts to have the jobs assigned to their members.³ We granted certiorari in order to settle doubts about whether the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present. Cf. *Whitehouse v. Illinois Cent. R. Co.*, 349 U. S. 366, 371-372. We hold that it must.

I.

Petitioner contends that it is entirely appropriate for the Adjustment Board to resolve disputes over work assignments in a proceeding in which only one union participates and in which only that union's contract with

the nonpetitioning union in the event the Board's decision adversely affected its members' jobs. The clerks' union used this form letter to respond to the § 3 First (j) notice in the instant case.

³ The Court of Appeals' controlling opinion is reported at 349 F. 2d 408. A prior opinion which was withdrawn is unofficially reported at 59 L. R. R. M. 2993.

the employer is considered. This contention rests on the premise that collective bargaining agreements are to be governed by the same common-law principles which control private contracts between two private parties. On this basis it is quite naturally assumed that a dispute over work assignments is a dispute between an employer and only one union. Thus, it is argued that each collective bargaining agreement is a thing apart from all others and each dispute over work assignments must be decided on the language of a single such agreement considered in isolation from all others.

We reject this line of reasoning. A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. *John Wiley & Sons v. Livingston*, 376 U. S. 543, 550; cf. *Steele v. Louisville & N. R. Co.*, 323 U. S. 192. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578–579. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.

There are two kinds of these jurisdictional disputes. Both are essentially disputes between two competing unions, not merely disputes between an employer and a single union. The ordinary jurisdictional dispute arises when two or more unions claim the right to perform a job

which existed at the time their collective bargaining contracts with the employer were made. In such a situation it would be highly unlikely that each contract could be construed as giving each union the right to be paid for the single job. But the dispute before us now is not the ordinary jurisdictional dispute where each union claims the right to perform a job which existed at the time their collective bargaining agreements were made. Here, though two jobs existed when the collective bargaining agreements were made and though the railroad properly could contract with one union to perform one job and the other union to perform the other, automation has now resulted in there being only one job, a job which is different from either of the former two jobs and which was not expressly contracted to either of the unions. Although only one union can be assigned this new job, it may be that the railroad's agreement with the nonassigned union obligates the railroad to pay it for idleness attributable to such automation job-elimination. But this does not mean that both unions can, under their separate agreements, have the right to perform the new job or that the Board, once the dispute has been submitted to it, can postpone determining which union has the right to the job in the future. By first ordering the railroad to pay one union and then later, in a separate proceeding, ordering it to pay the other union, without ever determining which union has the right to perform the job and thus without ever prejudicing the rights of the other union, the Board abdicates its duty to settle the entire dispute. Yet this is precisely the kind of merry-go-round situation which the petitioner claims is envisaged by the Act, a procedure which certainly does not "provide for the *prompt and orderly* settlement of *all* disputes . . . , " the purpose for which the Adjustment Board was established. § 2 (5).

II.

The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle disputes of this nature. And we have said in no uncertain language that the Adjustment Board has jurisdiction to do so. *Order of Railway Conductors v. Pitney*, 326 U. S. 561, was decided 20 years ago. That case concerned a dispute over which employees should be assigned to do certain railroad jobs, members of the conductors' union under their contract or members of the trainmen's union under their contract. In that case a district court, in charge of a railroad in bankruptcy, had entered a judgment in favor of the conductors. We reversed, holding that the Railway Labor Act vested exclusive power in the Adjustment Board to decide that controversy over job assignments. It is true that we did not precisely decide there that the Board must bring before it all unions claiming the same jobs for their members, but we did say this:

"We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. . . . For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and techni-

cal. An agency especially competent and specifically designated to deal with it has been created by Congress." *Id.*, at 566-567. (Emphasis supplied.)

Four years after *Pitney* we decided *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239. In that case a state court had interpreted collective bargaining contracts between a railroad and the same two unions here and had decided in favor of the clerks. We reversed, and, relying on *Pitney*, said:

" . . . There we held, in a case remarkably similar to the one before us now, that the Federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S., at 567-568." *Id.*, at 243-244. (Emphasis supplied.)

We adhere to our holdings in *Pitney* and *Slocum* that the Adjustment Board does have exclusive jurisdiction to hear and determine disputes like this. See also *Order of Railway Conductors of America v. Southern R. Co.*, 339 U. S. 255. Petitioner argues that we are barred from this holding by *Whitehouse v. Illinois Cent. R. Co.*, 349 U. S. 366, decided after *Pitney* and *Slocum*. There is some language in *Whitehouse* which, given one interpretation, might justify an inference against the Adjustment Board's jurisdiction fully to decide this case in a single proceeding. But in the final analysis the holding in *Whitehouse* was only that the primary jurisdiction of the Adjustment Board could not be frustrated by a pre-

mature judicial action. Cf. *Carey v. Westinghouse Elec. Corp.*, 375 U. S. 261, 265-266. We decline to expand that case beyond its actual holding.

The Adjustment Board has jurisdiction, which petitioner admits, to hear and decide the controversy over the interpretation of the telegraphers' collective contract with the railroad as it relates to the work assignments. And § 3 First (j) provides that "the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." The clerks' union was given notice here as it should have been under § 3 First (j). Certainly it is "involved" in this dispute. Without its presence, unless it chooses to default and surrender its claims for its members, neither the Board nor the courts below could determine this whole dispute. As respondent contends, to decide, as the Board has here, that the telegraphers are entitled to be paid for these jobs creates another controversy for the railroad with the clerks who have the jobs now. For should the Board's order be sustained, the railroad would not only have to make back payments to the telegraphers who have done no work but would be compelled to continue to pay two sets of workers—one set being idle. The Adjustment Board, as we said about the National Labor Relations Board in *Labor Board v. Radio & Television Broadcast Eng'rs Union*, 364 U. S. 573, 582-583, can, with its experience and common sense, handle this entire dispute in a satisfactory manner in a single proceeding.

We affirm the judgment of the Court of Appeals in holding that the clerks' union should be a party before the Board and the courts to this labor dispute over job assignments for its members. The cause should be remanded to the District Court with directions to remand

this case to the Board.⁴ The Board should be directed to give once again the clerks' union an opportunity to be heard, and, whether or not the clerks' union accepts this opportunity, to resolve this entire dispute upon consideration not only of the contract between the railroad and the telegraphers, but "in light of . . . [contracts] between the railroad" and any other union "involved" in the overall dispute, and upon consideration of "evidence as to usage, practice and custom" pertinent to all these agreements. *Order of Railway Conductors v. Pitney, supra*, at 567. The Board's order, based upon such thorough consideration after giving the clerks' union a chance to be heard, will then be enforceable by the courts.

It is so ordered.

⁴ The Court of Appeals in affirming the dismissal of the telegraphers' union's petition for enforcement was quite correct in holding that the failure of the clerks to appear before the Board and of the Board to consider the contract between the clerks and the railroad could not be cured merely by joinder of the clerks' union in the District Court's enforcement proceeding. The Board had the exclusive jurisdiction to consider the clerks' contract and any claim they might have asserted under it. At the time, the Court of Appeals had no alternative but to affirm the dismissal by the District Court, for district courts could only "enforce or set aside" the Board's orders under § 3 First (p). They could not remand cases to the Board. This was changed on June 20, 1966, by Pub. L. No. 89-456, § 2 (e), 80 Stat. 208, which inserted a new provision, § 3 First (q), empowering district courts to remand proceedings to the Board. In view of the Board's failure to consider all of the issues and the clerks' understandable refusal to participate because of the then existing doubt as to whether they could be bound by the Board's decision, we conclude it appropriate to use this new availability of remand to the Board.

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SUPREME COURT OF THE UNITED STATES

No. 28.—OCTOBER TERM, 1966.

Transportation—Communication Employees Union, Petitioner, v. Union Pacific Railroad Co.	} On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.
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[December 5, 1966.]

MR. JUSTICE STEWART, whom MR. JUSTICE BRENNAN joins, concurring.

Until now the Adjustment Board has dealt with the claim of the telegraphers as though it were totally unrelated to the claim of the clerks. To take this piecemeal approach to the underlying causes of this controversy not only invites inconsistent awards, but also ignores the industrial context in which the disputed contract was framed and implemented.

This case aptly illustrates why the Board cannot judge one-half of a problem while closing its eyes to the other half. The disputed provisions of the collective agreement were drawn before technological progress telescoped two work stations into one. The agreement did not explicitly provide for such a change. But it was designed to cover an extended period of time, and its language is sufficiently general to allow for flexibility in the light of changing circumstances.*

*Among the rules of the Telegraphers' Agreement invoked in this dispute, the following are the most relevant:

ARTICLE 1—SCOPE.

Rule 1. This agreement will govern the wages and working conditions of agents, agent-telegraphers, agent-telephoners, telegraphers, telephoners, telegrapher-clerks, telephoner-clerks, telegrapher-car distributors, ticket clerk-telegraphers, telegrapher-switch-tenders, C. T. C. telegraphers, train and tower directors, towermen, levermen, block operators, staffmen, managers, wire chiefs, repeater chiefs,

2 T.-C. E. U. v. UNION PACIFIC R. CO.

To do justice to the parties in this situation the Board must take full measure of their circumstances. To justify the deference which the law has given to its deci-

chief operators, printer mechanics, telephone operators (except switchboard operators), teletype operators, printer operators, agents non-telegraphers, and agents non-telephoners herein listed.

ARTICLE 2—POSITIONS AND RATES OF PAY.

Rule 5. General Telegraph Offices. (a) Positions and rates of pay in general telegraph offices under the jurisdiction of the Superintendent Telegraph shall be as follows:

4 Las Vegas "VG"

Manager	2.127
2d chief operator-printer machn.....	1.995
3d chief operator-printer mechn.....	1.995
Telegrapher	1.851

Rule 6. New Positions. The wages of new positions shall be in conformity with the wages of positions of similar kind or class in the seniority district where created.

ARTICLE 3—TIME ALLOWANCES.

Rule 10. Daily Guarantee. Regularly assigned employes will receive eight hours pay for each twenty-four hours, at rate of position occupied,

ARTICLE 6—SENIORITY.

Rule 47. Promotion. (a) Promotion shall be based on seniority and qualifications; qualifications being sufficient, seniority will prevail.

ARTICLE 8—GENERAL.

Rule 62. Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed, and is available, or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call.

Rule 70. Date Effective and Changes. This agreement will be effective as of January 1, 1952, and shall continue in effect until it is changed as provided herein, or under the provisions of the Railway Labor Act.

sions, the Board must employ a decision-making technique that rests on fair procedure and industrial realities. By using a simple bilateral contract analysis the Board defaults in both of these duties. Cf., Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 22-23, 26-27 (1957); Note, 75 Yale L. J. 877, 889-890 (1966).

Only by proceeding as the Court today directs can the Board properly decide cases of this kind. The provisions in the Railway Labor Act which state that the Board's orders are to be directed only against the carrier do not detract from the power of the Board to fulfill its tasks. For if the telegraphers and the clerks both advanced their claims and the Board directed the carrier to honor the claims of only one union, the other union would be bound just as though it had lost in a multi-lateral *in rem* proceeding. See, 3 Freeman, The Law of Judgments §§ 1524-1526 (5th ed. 1925).

Since the Board has failed to use procedures which allow for an informed and fair understanding of the dispute between the petitioner and respondent, I concur in the opinion and judgment of the Court.

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[December 5, 1966.]

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, dissenting.

This case involves a dispute between the telegraphers' union and a railroad as to whether the union's members, under its collective bargaining agreement with the carrier, were entitled to certain jobs (or compensatory payments in lieu thereof) which the carrier had unilaterally allotted to another union, the clerks. The telegraphers complained to the Railroad Adjustment Board. The Board held that, under the contract between the telegraphers and the railroad, the telegraphers' members had a right to the jobs, and it ordered the carrier to make compensatory payments to the senior telegrapher idled by its action.

The Court now holds that such an award will not be enforced because the clerks' union was not a party to the proceedings, and because the Board merely adjudicated the rights of the telegraphers and did not determine whether the clerks were entitled to the jobs instead. The Court's opinion states that the jobs in question must belong to one union or the other, and that it is the Board's duty to decide which of the two unions is entitled to the jobs.

I dissent. The Board acted as the statute commands. As I shall discuss, its power is limited to adjudications of grievances and contract disputes between a union and a railroad. It cannot compel conversion of a complaint

proceeding between a union and a railroad into a three-party proceeding to "settle the entire dispute." Certainly, the courts should not refuse to enforce its award because the Board has failed to do something which the statute does not require or empower it to do. I also emphatically submit that this Court should neither devise nor impose upon the Board or upon management and labor, the proposition, making its debut in this case in the field of railway-labor law, that "only one union can be assigned this new job." There is nothing in the statute or precedents that permits or justifies this peremptory judicial foray into other peoples' business.

The basis of the Court's holding cannot be found in any provision of the Railway Labor Act. 44 Stat. 577 (1926), as amended, 45 U. S. C. §§ 151-188 (as amended by Act of June 20, 1966, 80 Stat. 208). The Court adverts to § 2 of the Act, which sets forth the purposes of the Railway Labor Act (including, of course, provisions relating to the National Mediation Board and provisions creating general duties and rights of carriers and employees—none of which defines the powers of the Adjustment Board). Section 2 sets forth a number of purposes, among which appears the phrase quoted in part by the Court: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." To the extent to which these provisions relate specifically to the purposes of the Adjustment Board, they do not define its powers. The Board's powers are specifically defined and limited in § 3 First (i) of the Act. The Court begs the question by giving to the phrase "settlement of all disputes" a meaning which disregards

both the qualifying language of § 2 itself, and the specific enumeration of powers in § 3 First (i).

Ultimately, however, the Court appears to rest its decision not upon the Act, but upon a "principle" which it now creates. That proposition—unknown to railway labor law until this day—is that whatever the parties' contract provides, the Board must observe and enforce the rule that "only one union can be assigned this new job." The Court holds that even if "the railroad's agreement with the nonassigned union obligates the railroad to pay it for idleness attributable to such automatic job-elimination," the Board cannot conclude "that both unions can, under their separate agreements, have the right to perform the new job. . . ." It is because of this controlling principle that the Court asserts it was error for the Board to make an award unless the award would bind the clerks' union as well. Throughout its opinion the Court stresses that there is now but one "job" and that only one union's member can have "the right to the job." Obviously only one person can actually *do* the job; but the Board held only that a telegrapher was entitled to be *paid* for the job. In fact, the Court is—without articulating its premise—assuming that featherbedding is forbidden by natural law or some other type of mandate that overrides contract, and that it is the Board's duty to enforce the prohibition. From this novel premise it derives its conclusion that the award was not enforceable.

There is no basis in the Railway Labor Act for either of the Court's propositions: that both unions must be parties to a proceeding initiated by one of them, or that the Board must "settle the entire dispute" by determining that one or the other (but not both) of the unions has title to the jobs. The Court's predilection for one job-one man may be sensible, but it may also be contrary to contract; and I know of no provision in the

Constitution or statutes or decided cases that compels it. There is no basis for this Court to dictate—and that is what it is here doing—that a collective bargaining contract may not be enforced in accordance with its terms but must be subordinated to a one job-one man theory. This Court cannot and should not impose its own views. The anti-featherbedding principle may or may not be an admirable theory, depending upon one's preconceptions and point of view. It does not now exist in the railway labor field. And I respectfully suggest that this Court is in no position to assess the desirability of its judicial innovation. If featherbedding in the railroad industry is to be declared unlawful, it should not be this Court which does it. To say the least, the problems are too esoteric and too volatile to be the subject of judicial edict. They should be left to the parties and the legislature. Certainly, this Court should not invade the integrity of collective bargaining contracts to legislate the result it considers desirable or "orderly."

Only last Term this Court considered one of the peculiar institutions of railway labor, and sustained the validity of state "full-crew" statutes. These statutes, in direct contrast to the one job-one man principle that the Court today assumes, have the effect sometimes of requiring railroads to hire one man-no job." The Court sustained these statutes against claims, among others, that Congress in the Railway Labor Act had pre-empted the field. *Engineers v. Chicago, R. I. & P. R. Co.*, 382 U. S. 423 (1966). Such a "sensitive and touchy problem" (*id.*, at 430), the Court wisely decided, was to be left to collective bargaining and the States in the absence of a clear congressional command. It is hard to comprehend the *Engineers* case if, as the Court now finds, the Railway Labor Act itself (presumably ever since its enactment in 1926) or other overriding law for-

bids what "full-crew" laws command. Certainly, the present problem, if it is a different one at all, is equally "sensitive and touchy," and the Court has yet to disclose the congressional authority dictating contrary treatment.

Prior decisions of this Court are of no assistance. The Court first refers to *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946). The Court candidly states that "we did not precisely decide there that the Board must bring before it all unions claiming the same jobs for their members. . . ." All that the Court decided in *Pitney* was that a dispute between two unions claiming a right to certain jobs had first to be determined by the Railroad Adjustment Board, and could not be decided initially by a bankruptcy court in reorganization proceedings. The passage from *Pitney* quoted by the Court merely states that the decision of the issue—the interpretation of the conductors' collective contract—had to be made in light of usage, practice and custom, and of other agreements between the railroad and the trainmen. Indeed, the quotation from *Pitney* recalls the basic principle that the Court here ignores: that in the "intricate and technical" field of railway labor relations, no court, including this Court, should displace the agency which Congress has vested with authority—certainly not with the drastic imposition of a mandate to eliminate featherbedding.

It is, however, essential to note that there is absolutely no reason to believe that the Board failed to follow *Pitney* here. Both the majority and concurring opinions assume as fact that the Adjustment Board violated the duty declared in *Pitney* to construe the telegraphers' contract in light of the clerks' contract and railroad usage, practice and custom. Thus the majority characterizes the Board's proceedings in this case as one "in which only [the telegraphers'] . . . contract with the employer [was] . . . considered." The concurrence as-

serts that "Until now the Adjustment Board has dealt with the claim of the telegraphers as though it were totally unrelated to the claim of the clerks," and has used "a simple bilateral contract analysis" which prevented it from arriving at "an informed and fair understanding of the dispute between the petitioner and respondent." I am unable to find in the record before this Court any support for these suggestions that the Adjustment Board failed to perform its duty by refusing to consider the clerks' contract for its evidentiary value.¹

The award of the Board makes clear that both practice and usage, and the possibly conflicting contractual claim of the clerks to the job in question, and the fact that clerks were currently performing the job, were considered by the Board. As to usage, the Board itself observed, with respect to a different aspect of its award, that "there is unanimity upon the proposition that where, as here, the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreement."

The Board's analysis of the substance of the dispute shows its central awareness of the clerks' claim to the jobs. The machines involved in this case are IBM teletype printers and receivers. They perform automati-

¹ The Court of Appeals' opinion asserts that the Board's rules of evidence excluded other contracts, and that the Board dealt with the case as if the clerks' contract did not exist. There is nothing in the record which suggests that at any time, in any way, the Board excluded references to the clerks' contract or treated it as irrelevant. If the Court of Appeals were correct as to the Board's rules, those rules would plainly be contrary to law and common-sense evidentiary principles. The railroad's submission to the Board, in demanding that notice be given the clerks' union (as it was), specifically invoked the clerks' contract, and stated that the relief sought by the telegraphers "would abrogate the agreement negotiated between the carrier and the Clerks' Organization"

cally the function of transmitting and receiving teletype messages between on line railroad offices. The Board found that prior to the installation of these machines, telegraphers had exclusively performed this transmitting and receiving function as teletype operators and printer operators. However, apparently for its own convenience, since other machines in its IBM-complex were operated by clerks, the railroad unilaterally assigned the operation of the teletype printers and receivers to members of the clerks' union. The Board found that the work involved in operating the new machines had "been performed in the past by telegraphers and not by clerks."

Furthermore, even if the majority and concurring opinions were correct in stating that the Board failed to take the proper broad view of its function in construing the contract before it, the remedy, of course, would be to remand to the Board for a second proceeding to construe *this* contract. Instead, the Court remands for an entirely new proceeding to construe not only the contract brought before the Board in this case, but also the contract of a third party which has never invoked the Board's jurisdiction, which is not a party and which can be compelled to become a party only by this Court's gloss on the statute, and in addition to apply in this new proceeding a novel substantive principle forbidding featherbedding.

Actually, the railroad's complaint is not that the Board refused to *consider* the clerks' contract, or relevant usage and practice. It is that the Board did not *decide* matters outside the issues submitted to it by the parties and the statute. And despite suggestions that *Pitney* was violated, the Court's real point—as it is respondent's—is that the Board should, in this proceeding between the telegraphers' union and the carrier, also *decide* the rights of the clerks' union—and should do so by awarding the jobs to one union or the other.

The Court also refers to *Slocum v. Delaware, L. & W. Co.*, 339 U. S. 239 (1950). This case is of no assistance whatever. The railroad filed an action in a state court for a declaratory judgment as to which of two unions was entitled under its contract with the railroad to have its members perform disputed jobs. Both unions were joined as defendants. This Court again held that the courts should not interpret the unions' contracts because this question is for determination by the Adjustment Board, "a congressionally designated agency peculiarly competent in the field." 339 U. S., at 244.

There is no doubt of the soundness of either *Pitney* or *Slocum*. The Railroad Adjustment Board does have exclusive, primary jurisdiction to determine contract disputes between a union and a carrier. And the Board must do so in light of "evidence as to usage, practice and custom" and of allegedly overlapping contracts with other unions. But the Board's authority is specific and limited. The Railway Labor Act narrowly defines the Adjustment Board's power. The Board ² hears disputes (a) "between an employee or group of employees and a carrier or carriers," (b) "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," (c) if the dispute is referred to it "by petition of the parties or by either party." It renders "awards," which are "final and binding upon both parties to the dispute."³ That is the sum total of powers over disputes vested in the Railroad Adjustment Board.⁴

² Actually, the Board functions in divisions, each responsible for a specified group of trades within the railroad world. § 3 First (h).

³ Sections 3 First (i), (m) as amended by the Act of June 20, 1966 (80 Stat. 208). Prior to this amendment "money awards" were excluded from the scope of the quoted language.

⁴ There are a few minor exceptions not relevant here. For example, the Board can interpret its own awards. § 3 First (m).

The Railroad Adjustment Board is quite a different agency from the National Labor Relations Board, from whose somewhat analogous role in other industries the Court appears to derive some comfort.⁵ The NLRB has broad jurisdiction over "unfair labor practices." Section 10 (k) of the National Labor Relations Act (49 Stat. 453, as amended, 61 Stat. 146, 29 U. S. C. § 160 (k)) provides that whenever it is charged that any person has engaged in the unfair labor practice of a strike to enforce a union's demand in a jurisdictional controversy with another union, the NLRB is "empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen." Under this section, this Court has in the past required the NLRB to take action of the kind which, in the present case, it for the first time requires of the Railroad Adjustment Board. The Court has held that the NLRB cannot obtain enforcement of a cease-and-desist order which determines only that the respondent union is not entitled to the work in dispute under its certification or collective bargaining agreement. The Court required that the Board go further and decide which of the two contending unions is entitled to the work and "then specifically to award such tasks in accordance with its decision." *Labor Board v. Radio Engineers*, 364 U. S.

⁵ In *Whitehouse v. Illinois Central R. Co.*, 349 U. S. 366 (1955), this Court cautioned against analogies drawn from other industries to railroad problems: "Both its history and the interests it governs show the Railway Labor Act to be unique. 'The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.' Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 568-569." 349 U. S., at 371.

573, 586 (1961).⁶ The difficulty, however, is that § 10 (k) has no counterpart in the Railway Labor Act. No such power exists in the Railroad Adjustment Board, nor does the statute impose any comparable duty upon it.

The Board is essentially a permanent bilateral arbitration institution created by statute for settling disputes arising in the context of an established contractual relationship.⁷ Its nature is illustrated by the provisions of the Act relating to awards made by the Board. These are couched in terms which assume a grievance or claim asserted by an employee or a union against a carrier. The provisions refer only to carriers, not to other unions. For example, § 3 First (o) states that "In case of an award . . . in favor of petitioner . . . the Board shall make an order, directed to *the carrier*, to make the award effective" (Italics added.) The only provision in the Act for enforcement of awards is cast in terms of the carrier: "If a *carrier* does not comply with an order" § 3 First (p). (Italics added.) Nowhere in the Act is there a syllable which would indicate the intention that the Board is empowered to make awards as between the claims of contending unions. The Act is as clear as can be that the Adjustment Board's func-

⁶ But cf. *Carey v. Westinghouse Corp.*, 375 U. S. 261 (1964), in which the Court held that a union could obtain a court order to compel arbitration of a similar type of dispute, under an arbitration provision of a collective bargaining agreement between itself and the employer, despite the fact that the arbitration proceedings would not bind the other contending union.

⁷ The Board has no jurisdiction over so-called "major" disputes which are outside the collective contract framework—for example, a dispute as to whether the contract should be changed. See *Elgin, U. & E. R. Co. v. Burley*, 325 U. S. 711, 722-728 (1945), adhered to on rehearing, 327 U. S. 661 (1946). To the extent that resolution of such disputes is subjected to a legal structure, it is the National Mediation Board, not the Railroad Adjustment Board, which is the responsible federal agency under the Railway Labor Act.

tion is to act in disputes between a carrier and a union or employee, to adjudicate grievances of employees or their organizations against the carriers, and to pass upon controversies as to the meaning of the collective bargaining agreement between a carrier and a union.⁸ The Board is not comparable in scope, function, capability or authority to the National Labor Relations Board.⁹ It has no authority over "unfair labor practices" in general. It has no power comparable to that given the NLRB by § 10 (k) of the National Labor Relations Act to "hear and determine" jurisdictional disputes; it may make a decision affecting a jurisdictional dispute, but only if it comes to the Board in the limited and constricted form of a dispute between a union and a carrier as to the meaning and application of their agreement.

The Act does not give the Board power to compel a union which is affected by a contract dispute between another union and a carrier to participate in or be bound by the proceeding. This is "one thing [that] is unquestioned" according to the opinion of this Court in *Whitehouse v. Illinois Central R. Co.*, 349 U. S. 366, 372

⁸ The Board, with its peculiar bipartisan, private composition, §§ 3 First (a)-(h), is perhaps suited to this task, but one might question whether it would be appropriate for a larger role. For instance, since each division of the Board is composed of an equal number of railroad union and carrier representatives, and makes awards by majority vote, if the union representatives on the division were split—if, for example, either union had a representative on the division who disagreed with the other union representatives on the merits of the dispute—the carrier representatives would then have controlling voting power and could in effect allocate the work to whichever union they chose.

⁹ The two Boards are utterly different. Some of the differences are adverted to in the text, and others are suggested by notes 7 and 8, *supra*. The essential difference is between a permanent institutionalized arbitrator for settling disputes arising from a contractual relationship, and an administrative agency established to implement various defined public policies specified by Congress.

(1955).¹⁰ In that case, a dispute had arisen between the telegraphers and the respond railroad because the railroad employed members of the clerks' union for jobs which the telegraphers claimed should have been allotted to its members under its collective bargaining agreement with the railroad. In due course, the telegraphers submitted the dispute to the Railroad Adjustment Board. Before a decision was announced by the Board, the railroad brought an action in the United States District Court to compel the Board to notify the clerks, asserting that otherwise the railroad might have to face a similar claim from the clerks. This Court held that the action was premature; but it pointed out that "One thing is unquestioned. Were notice given to clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding." 349 U. S., at 372. It said, flatly, that "The Board has jurisdiction over the only necessary parties to the proceeding [*i. e.*, the telegraphers' union] and over the subject matter." *Id.*, at 373. In substance, the Court in the present case repudiates *Whitehouse* for reasons not of law, but of assumed practical administrative symmetry and its own conceptions as to what is fair in a complex industrial situation. Labor relations are not susceptible of reduction to such simplicities; and with all deference this Court should fear to tread this path.

This is much more than a procedural matter. It is even more than whether the clerks can be subjected to a proceeding to which they assert they are strangers and to which Congress did not intend that they be subjected. The Court today rules that whatever the collec-

¹⁰ I suppose that if this Court says that the Board has power to subject another union to the proceedings, that would end the matter. But the effectiveness of our *ipse dixit* would not justify it.

tive bargaining agreements provide—regardless of their provisions, and of the understanding of the parties—the Board must award the disputed work to one union or the other, and that it cannot provide a remedy to members of both, even if their contracts should so demand.

This may sound eminently reasonable at first hearing. But it may be both unfair and highly disruptive. Certainly, there is not a line, a word, in the Railway Labor Act which supports it. Let us suppose, for example, in the present situation that each IBM machine required one operator, and that the machine and the one operator performed both clerical and telegraphic services, displacing a telegrapher and a clerk. I know of absolutely no warrant for the Court's statement that the Board must "settle the entire dispute" by determining "which union has the right to the job" even if "both unions . . . under their separate agreements, have the right to perform the new job. . . ." On the contrary, regardless of what the clerks' contract provides,¹¹ if the telegraphers' contract also establishes *their* right to the jobs—which is entirely conceivable—the telegraphers are entitled to compensation. It is entirely possible that since the Board, as I have discussed, is limited to construing and applying the agreements between each union and the carrier, it may indeed find that it has to require payment to members of one union for jobs actually performed by members of the other union. In that event, a sensible remedy would have to await negotiation between the union or unions and the carrier to eliminate the overlap and featherbedding.¹² But I repeat—the Board's task is to

¹¹ Of course, the clerks' contract may be relevant to construction of the telegraphers' contract, under the *Pitney* case.

¹² Under the Railway Labor Act, such contractual renegotiation would be a "major" dispute, subject to the jurisdiction of the Mediation Board, not the Adjustment Board. See note 7, *supra*. See also *Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330 (1960),

construe and apply the agreements, not to rewrite them, even to eliminate overlaps and duplications; nor is it the function of this Court to add new powers to those vested in the Board by Congress, or to impose upon the intricate and technical contracts of railway labor a new and unauthorized substantive principle.

I would reverse and remand for further proceedings in the District Court, consistent with the views expressed herein, with respect to the telegraphers' prayer for enforcement of the Board's award.

where the Court upheld the telegraphers' right to strike to compel bargaining on a proposed contract change which would have prevented the railroad from abolishing any position in existence before a certain date. The Court held this was a "major dispute" covering a legitimate subject of collective bargaining within the contemplation of the Railway Labor Act, and therefore within the anti-injunction provision of §§ 4, 8 and 13 (c) of the Norris-LaGuardia Act, 47 Stat. 70, 72, 73 (1932), 29 U. S. C. §§ 104, 108, 113 (c). It rejected the railroad's argument that the union's demand did not create a legitimate "labor dispute" within Norris-LaGuardia because it sought to perpetuate "wasteful" and "unnecessary" jobs.